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CHAPTER V - Sales

Witkin Summary of California Law

I. INTRODUCTION

A. Sales Distinguished From Other Transactions.

1. Bailment.

4 Witkin Sum. Cal. Law Sales § 1

[§ 1] Bailment.

A bailment is usually clearly distinguishable from a sale. (See *H. S. Crocker Co. v. McFaddin* (1957) 148 C.A.2d 639, 643, 307 P.2d 429, *infra*, §46; 13 *Summary* (10th), *Personal Property*, §156.) But a superficial resemblance exists between a *bailment with option to buy*, and a *sale with option to return* (i.e., "sale or return," *infra*, §122). The principal test is whether there was a binding promise, on the part of the person to whom the possession was given, to pay for the goods. If so, it is a sale, title passing at once, subject to the right to return. If not, it is a mere bailment, and no title passes until the option to buy is exercised. (See *People v. Baker* (1923) 64 C.A. 336, 341, 221 P. 654; *People v. Seymour* (1942) 54 C.A.2d 266, 273, 128 P.2d 726; *Jackson v. Department of Justice* (2001) 85 C.A.4th 1334, 1350, 102 C.R.2d 849, quoting the text.)

The similarity is greater between a bailment with option to buy and a *sale on approval* (see *infra*, §121). Where the sale is on approval, goods are delivered to the prospective buyer for use but they remain the seller's property until acceptance or retention for an unreasonable time. A sale on approval presupposes, however, that a sales contract was contemplated by the parties. Further, unauthorized use renders a bailee liable for damages to the goods or for conversion, while inconsistent use of goods sold on approval constitutes an acceptance of them. (See *infra*, §121.)

West's Key Number Digest, Sales k.4(1) et seq.

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A. Sales Distinguished From Other Transactions.

2. Sales Agency and Consignment.

4 *Witkin Sum. Cal. Law Sales* § 2

[§ 2] Sales Agency and Consignment.

In a *consignment* for sale, as to a factor, title does not pass until the latter sells the goods. (See *Moulton v. Williams Fruit Corp.* (1933) 218 C. 106, 109, 21 P.2d 936; *Bank of California v. Thornton-Blue Pac.* (1997) 53 C.A.4th 841, 847, 62 C.R.2d 90; 1 Proof of Facts 2d 223 [consignment]; *infra*, §135.)

A contract establishing an "agency" with the exclusive privilege of selling a particular product may, despite such designation, amount to a *sale* instead of a mere agency or consignment. If the person contracts to buy goods from another to sell as his or her own, there is a sale, and the buyer is liable to the other as a *debtor* for the *price*; whereas if the person takes the goods as the property of the principal, subject to the latter's control and right of recall, and the latter has the right to receive the *proceeds* when sold less the agent's *commission*, there is an agency. (*Reiter v. Anderson* (1927) 87 C.A. 642, 648, 262 P. 415; see *Chastain v. Belmont* (1954) 43 C.2d 45, 53, 271 P.2d 498 [ambiguous consignment contract interpreted as sale]; *Hacker Pipe & Supply Co. v. Chapman Valve Mfg. Co.* (1936) 17 C.A.2d 265, 267, 61 P.2d 944 [exclusive agency to sell goods treated as agency]; *Shafford v. Otto Sales Co.* (1953) 119 C.A.2d 849, 859, 260 P.2d 269 [purported agency agreement held sham to conceal actual sale transactions]; *Hancock Oil Co. v. McClellan* (1955) 135 C.A.2d 667, 668, 288 P.2d 39 [nonexclusive distributorship terminable on 7 days' notice held not a contract of sale]; *Consolidated Accessories Corp. v. Franchise Tax Bd.* (1984) 161 C.A.3d 1036, 1040, 208 C.R. 74 [agreement under which Texas corporation sent ladies' accessories to California retail stores strongly suggested consignment arrangement rather than sale]; *Jackson v. Department of Justice* (2001) 85 C.A.4th 1334, 1350, 102 C.R.2d 849, quoting the text [where gun dealer did not contract with those from whom he received assault weapons to sell them as his own, and he admitted he took weapons subject to transferors' right of recall, transfers constituted consignments, not sales]; on similar issues involving real property interests, see *Ruess v. Baron* (1932) 217 C. 83, 88, 17 P.2d 119; *Stoddard v. Goldenberg* (1941) 48 C.A.2d 319, 323, 119 P.2d 800; and see generally 67 *Am.Jur.2d* (2003 ed.), *Sales* §§41-43.)

West's Key Number Digest, Sales k.8

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3. Option To Buy.

4 *Witkin Sum. Cal. Law Sales* § 3

[§ 3] Option To Buy.

An option merely gives a right or election to purchase within a specified time, while a contract of sale imposes obligations to buy and sell. (See *Western Helicopter Operations v. Nelson* (1953) 118 C.A.2d 359, 366, 257 P.2d 1025; 17A Am.Jur.2d (1991 ed.), *Contracts* §51; 1 *Summary* (10th), *Contracts*, §168 et seq.)

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A. Sales Distinguished From Other Transactions.

4. Pledge.

4 Witkin Sum. Cal. Law Sales § 4

[§ 4] Pledge.

A transaction in which personal property is transferred and money is received may appear to be a sale and yet be, under the circumstances, a secured loan. A pledge is a security device, and a practical test to distinguish a pledge from a sale is whether the property was transferred to secure an obligation. (See *Milana v. Credit Discount Co. (1945) 27 C.2d 335, 340, 163 P.2d 869* ["sale" of accounts receivable accompanied by absolute guarantee that accounts would be paid held a pledge]; *Shelley v. Byers (1925) 73 C.A. 44, 61, 238 P. 177* ["sale" of stock by bankrupt with right to repurchase held a pledge]; 4 *Summary* (10th), *Secured Transactions in Personal Property*, §2 et seq.)

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I. INTRODUCTION

B. Former Uniform Acts.

4 Witkin Sum. Cal. Law Sales § 5

[§ 5] Former Uniform Acts.

(1) *Uniform Sales Act*. The Uniform Sales Act was first promulgated in 1906 and was adopted in California in 1931, superseding various provisions of the old Field Code. The Act served as the basis of California sales law until it was superseded by the Uniform Commercial Code in 1965. The Act made a number of important changes in the California law of sales and brought it in line with that of a majority of jurisdictions. (For a general comparison of the Sales Act with prior California law, see 5 *Cal. L. Rev.* 400, 471; 6 *Cal. L. Rev.* 37; 9 *Cal. L. Rev.* 27; 7 *So. Cal. L. Rev.* 96.)

The Uniform Sales Act was adopted as former *sections 1721 through 1800 of the Civil Code*. Since its repeal those section numbers have in large part been reassigned for other legislation. References in this Chapter to "former" Civil Code sections can be traced to the corresponding sections of the Official Text of the Uniform Sales Act through the table in West's Annotated California Codes, Commercial Code, vol. 23A, pt. 1, p. 18.

(2) *Other Uniform Acts Affecting Sales*. Several other Uniform Acts which affected sales were in force in California prior to January 1, 1965: *Uniform Bills of Lading Act* (former C.C. 2126 et seq.); *Uniform Warehouse Receipts Act* (former C.C. 1858.01 et seq.; 13 *Summary* (10th), *Personal Property*, §173 et seq.); *Uniform Stock Transfer Act* with modifications (former Corp.C. 2450 et seq.; 9 *Summary* (10th), *Corporations*, §132); *Uniform Trust Receipts Act* (former C.C. 3012 et seq.; 4 *Summary* (10th), *Secured Transactions in Personal Property*, §10). Like the Sales Act, these Uniform Acts were replaced by the Uniform Commercial Code.

West's Key Number Digest, Sales k.1.5

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I. INTRODUCTION

C. Uniform Commercial Code.

1. Drafting and General Acceptance.

4 Witkin Sum. Cal. Law Sales § 6

[§ 6] Drafting and General Acceptance.

The Uniform Commercial Code, drafted by the American Law Institute and National Conference of Commissioners on Uniform State Laws, was approved in 1952. It is a comprehensive and radical revision of a number of the Uniform Acts. (See *100 Harv. L. Rev.* 465 [origins of Uniform Commercial Code]; *15A Am.Jur.2d* (2000 ed.), *Commercial Code* §1 et seq.; infra, §8.)

The Code was adopted in Pennsylvania in 1953, but general acceptance did not immediately follow and several revisions were promulgated in the succeeding decade. By 1972, however, the Code had been adopted in the Virgin Islands, the District of Columbia, and every state except Louisiana. In 1974 and 1978, Louisiana adopted portions of the Code. (See 1 U.L.A. (Master Ed.), p. 1; for a complete history of the development and adoption of the Code, see 1 U.L.A. (Master Ed.), p. xvii et seq.; see also 1 Williston on Sales (5th), §1-5; C.E.B., 1 UCC Sales and Leases, §1.2; *30 Hastings L. J.* 337 [decline in uniformity due to state-by-state amendments].)

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C. Uniform Commercial Code.

2. Adoption in California.

4 Witkin Sum. Cal. Law Sales § 7

[§ 7] Adoption in California.

The Uniform Commercial Code (cited herein as U.C.C.) was enacted by the 1963 Legislature and became effective in California on January 1, 1965 (see U.C.C. 13101), repealing several Uniform Acts (*supra*, §5) and inconsistent statutes (see U.C.C. 13103) with a proviso retaining existing laws on bailees and bailees' businesses (see U.C.C. 13104). U.C.C. 13102 provided for transactions taking place during the transition period.

The 1975 Legislature, in enacting the revised Division 9 of the Uniform Commercial Code (see 4 *Summary* (10th), *Secured Transactions in Personal Property*, §20), added new transition sections:

(1) The provisions of Division 13 continue to apply; i.e., the old and amended Code sections "shall be considered one continuous statute." (U.C.C. 14102.)

(2) Transactions validly entered into after January 1, 1965, and before January 1, 1976 (the effective date of the revision), are governed by the former law. (U.C.C. 14103.) (For the transition provisions applicable to secured transactions, see 4 *Summary* (10th), *Secured Transactions in Personal Property*, §25 et seq.)

The Legislature made many changes in the Official Text of the Code (see the California Code Comments contained in West's Annotated Codes, Commercial Code, vol. 23A et seq.), including deletion of the provision on *unconscionability* (see 1A U.L.A. (Master Ed.), §2-302; 25 *Hastings L. J.* 1, 53 [deletion of Unif.Com.C. §2-302, and similar provision in proposed Consumer Code]; C.C. 1670.5 [embodying Unif.Com.C. §2-302], 1 *Summary* (10th), *Contracts*, §§330, 332). The Official Text makes *section captions* a part of the Code (see 1 U.L.A. (Master Ed.), §1-109), but California did not adopt this provision.

SUPPLEMENT: [This section is current through the latest supplement]

U.C.C. 13104, relating to existing laws on bailees and bailees' businesses, was repealed in 2006. An uncoded provision states: "A document of title issued or a bailment that arises before January 1, 2007, and the rights, obligations, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule." (Stats. 2006, Chap. 254, §81.)



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C. Uniform Commercial Code.

3. Structure of the Code.

4 Witkin Sum. Cal. Law Sales § 8

[§ 8] Structure of the Code.

(1) *Official Code*. The Official Uniform Commercial Code is divided into the following *articles*:

Article 1--General Provisions

Article 2--Sales

Article 2A--Leases

Article 3--Negotiable Instruments

Article 4--Bank Deposits and Collections

Article 4A--Funds Transfers

Article 5--Letters of Credit

Article 6--Bulk Transfers

Article 7--Warehouse Receipts, Bills of Lading, and Other Documents of Title

Article 8--Investment Securities-

Article 9--Secured Transactions

Article 10--Effective Date and Repealer (original Code)

Article 11--Effective Date and Transition Provisions (revised Article 9)

Each article has its own short title. Thus, Article 2 may be referred to as Uniform Commercial Code--Sales. (See 1 U.L.A. (Master Ed.), §2-101.)

(2) *California Code*. The California version of the Code is similar but not identical. It consists of the following divisions:

Division 1--General Provisions

Division 2--Sales

Division 3--Negotiable Instruments

Division 4--Bank Deposits and Collections

Division 5--Letters of Credit

Division 6--Bulk Sales

Division 7--Warehouse Receipts, Bills of Lading and Other Documents of Title

Division 8--Investment Securities

Division 9--Secured Transactions

Division 10--Personal Property Leases

Division 11--Funds Transfers

Division 12--[repealed]

Division 13--Effective Date and Repealer (original Code)

Division 14--Effective Date and Transition Provisions (revised Division 9)

Division 15--Effective Date and Transition Provisions (revised Division 8)

Division 16--Effective Date and Transition Provisions (revised Divisions 3 and 4)

The numbering system is similar to that used in the Official Code: the California Code merely eliminates the dash. Most sections of the Official Code have a counterpart, often exact, in the corresponding section of the California Code. Thus, Unif.Com.C. §2-104 is identical to U.C.C. 2104. For this reason, Official Comments, case and law note annotations, and discussions in any textbook, encyclopedia, or annotated code can usually be found under the same section as in the California Code. It should be remembered, however, that even where corresponding sections of the official and California versions treat the same subject, the Legislature may have adopted language that departs from the original in significant respects. (See, e.g., U.C.C. 2403(3), *infra*, §137, which, as compared to the official version, limits the power of a merchant to whom goods are entrusted to transfer ownership rights to a buyer in the ordinary course of business.)

West's Key Number Digest, Sales k.1.5

SUPPLEMENT: [This section is current through the latest supplement]

(2) *California Code*. Division 1 of the Code, containing the general provisions, including many definitions, "applies to a transaction to the extent that it is governed by another division of this code." (U.C.C. 1102, added in 2006.) "This section makes clear what has always been the case--the rules in Article 1 apply to transactions to the extent that those transactions are governed by one of the other articles of the Uniform Commercial Code." (Official Comment 1.)



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C. Uniform Commercial Code.

4. Authorities and Source Materials.

4 Witkin Sum. Cal. Law Sales § 9

[§ 9] Authorities and Source Materials.

(1) *Official Text*. The Official Text of the Commercial Code is in volumes 1-3B, Uniform Laws Annotated, Master Edition. These volumes also contain the Official Comments, tables of state variations from the Official Text, case annotations, and the reports of the Permanent Editorial Committee. (See *Shea-Kaiser-Lockheed-Healy v. Department of Water & Power of Los Angeles* (1977) 73 C.A.3d 679, 688, 140 C.R. 884 [official comment, though not part of statute, may be followed if it is reasonable application of statute consistent with its purpose].)

(2) *California Text*. The Code as amended and adopted in California is in West's Annotated California Codes, Commercial Code, vols. 23A-23D. These volumes contain the Official Comments, the California Code Comments, law review citations, and annotations of cases decided under the Code and under similar provisions of former California statutes.

(3) *Law Reviews and Annual Survey*. There have been many general discussions of the Uniform Commercial Code and comparisons of it with the superseded Sales Act. (See 42 Cal. L. Rev. 653; 63 Harv. L. Rev. 561; 71 Harv. L. Rev. 674; 27 Stanf. L. Rev. 621 [Jurisprudence of the Code]; 29 Stanf. L. Rev. 1245 [How Appellate Opinions Should Justify Decisions Made Under the U.C.C.].) And the sales provisions of the Code as adopted in California have been contrasted with the prior California law of sales. (See 52 Cal. L. Rev. 281; 16 Hastings L. J. 551; 10 U.C.L.A. L. Rev. 1087; 11 U.C.L.A. L. Rev. 78.) Law review articles concerning current issues under the Code are cited at appropriate points throughout this chapter.

(4) *American Law Reports*. The third, fourth, and fifth series of American Law Reports include comprehensive annotations on each Commercial Code Article as well as annotations on selected problems under the Code. Cases dealing with the construction and effect of Article 2 are annotated at 17 A.L.R.3d 1010.

(5) *Treatises*. American Jurisprudence, Second Edition, contains a general article on the Commercial Code (see 15A Am.Jur.2d (2000 ed.), Commercial Code §1 et seq.) and gives selective coverage in other articles on commercial subjects. Anderson's Uniform Commercial Code, Third Edition, contains a commentary on each provision of the Official Text. C.E.B., UCC Sales and Leases, contains practice-oriented discussions of Article 2 of the Code, as does Cal. Civil Practice, 4 Business Litigation, §40:1 et seq.

(6) *Forms*. Legal and practice forms will be found in American Jurisprudence Legal Forms 2d, Chapter 253; Cal. Transactions Forms, 4 Business Transactions, Chap. 24; American Jurisprudence Pleading and Practice Forms, Revised, Volume 6; C.E.B., UCC Sales and Leases; and West's Annotated California Codes, Commercial Code.

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C. Uniform Commercial Code.

5. Purposes, Policies, and Construction.

a. Liberal and Uniform Construction.

4 Witkin Sum. Cal. Law Sales § 10

[§ 10] Liberal and Uniform Construction.

The Uniform Commercial Code is to be "liberally construed and applied to promote its underlying purposes and policies," which are "(a) To simplify, clarify and modernize the law governing commercial transactions; (b) To permit the continued expansion of commercial practices through custom, usage and agreement of the parties; (c) To make uniform the law among the various jurisdictions." (U.C.C. 1102(1), (2), and see Official Comments 1, 2; *Ford & Vlahos v. ITT Commercial Finance Corp.* (1994) 8 C.4th 1220, 1234, 36 C.R.2d 464, 885 P.2d 877 [purpose of Code, "in California and elsewhere, was to create a statutory scheme that would yield the fairest and most efficient framework possible for transactions involving personalty and fixtures"]; 1 U.L.A. (Master Ed.), pp. xxxi, xxxii [criticizing nonuniform amendments by various jurisdictions]; cf. former C.C. 1794 [making uniformity a purpose of the superseded Sales Act].)

Uniform judicial construction of the provisions of uniform acts furthers these purposes. Hence, a statute that has been copied from that of another state is deemed to have been enacted in consonance with the construction placed upon it by that state. (*Charles Nelson Co. v. Morton* (1930) 106 C.A. 144, 159, 288 P. 845 [decision under former Negotiable Instruments Law].) And the decisions of other states having the uniform law are good authority in litigation arising under the California act. (See *Porter v. Gibson* (1944) 25 C.2d 506, 512, 154 P.2d 703 [decision under former Sales Act]; C.E.B., 1 UCC Sales and Leases, §1.2.) Obviously, prior California decisions contrary to the general rule in states having the uniform act are not binding.

SUPPLEMENT: [This section is current through the latest supplement]

U.C.C. 1102(1), (2) were renumbered U.C.C. 1103(a) in 2006 without substantive change.



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C. Uniform Commercial Code.

5. Purposes, Policies, and Construction.

b. Other Rules of Construction.

4 *Witkin Sum. Cal. Law Sales* § 11

[§ 11] Other Rules of Construction.

(1) *Course of Dealing and Usage of Trade*. The Code defines both course of dealing (see U.C.C. 1205(1)) and usage of trade (see U.C.C. 1205(2)), and provides that either may "give particular meaning to and supplement or qualify terms of an agreement." (U.C.C. 1205(3).) (On priority when the two conflict, see U.C.C. 1205(4); on local usages of trade, see U.C.C. 1205(5); see also 26 Proof of Facts 2d 229 [meaning of abbreviation, word, or phrase according to usage of trade].)

(2) *Construction Against Implied Repeal*. "This code being a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided." (U.C.C. 1104.)

West's Key Number Digest, Sales k.54

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Course of Dealing and Usage of Trade*. U.C.C. 1205 was repealed and replaced in 2006 by U.C.C. 1303. The new statute defines three terms: "course of performance" (U.C.C. 1303(a)), "course of dealing" (U.C.C. 1303(b)), and "usage of trade" (U.C.C. 1303(c)). It further provides that any of these three "may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement." (U.C.C. 1303(d).) Conflicts among the three and the express terms of the agreement are resolved under U.C.C. 1303(e).



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5. Purposes, Policies, and Construction.

c. Supplementary General Law.

4 Witkin Sum. Cal. Law Sales § 12

[§ 12] Supplementary General Law.

"Unless displaced by the particular provisions of this code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions." (U.C.C. 1103; see *Atlas Thrift Co. v. Horan* (1972) 27 C.A.3d 999, 1005, 1008, 104 C.R. 315; *Grossman v. Lippson* (1978) 81 C.A.3d 554, 562, 146 C.R. 741 [U.C.C. does not displace doctrine of equitable setoff]; 1 Anderson 3d (2003 Rev. ed.), §1-103:1 et seq.)

This section consolidates and continues the provisions of the superseded Uniform Sales Act. (See U.C.C. 1103, Official Comment 2; cf. former C.C. 1722, 1793.) The scope of the section includes validating as well as invalidating causes, and is intended to include "any factor which at any time or in any manner renders or helps to render valid any right or transaction." (U.C.C. 1103, Official Comment 1; cf. former C.C. 1793 [limited to invalidating causes].)

The enumeration of U.C.C. 1103 is illustrative rather than exhaustive. Thus, occasional express references in other Code sections to supplementary fields of law are not intended to negate the effect of this section. (See U.C.C. 1103, Official Comment 3.)

SUPPLEMENT: [This section is current through the latest supplement]

U.C.C. 1103 was amended in 2006. The portion of the statute quoted in the text was lettered U.C.C. 1103(b), "or other validating" was replaced by "and other validating," and the "shall" preceding "supplement" was deleted.



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C. Uniform Commercial Code.

5. Purposes, Policies, and Construction.

d. Variation by Agreement.

4 Witkin Sum. Cal. Law Sales § 13

[§ 13] Variation by Agreement.

Former Civil Code section 1791 allowed rights, duties, and liabilities that arose under the Sales Act by implication of law to be negated or varied by agreement. The Commercial Code, with certain qualifications, preserves this freedom of contract:

(1) *Varying the Effect of Code Provisions.* The "effect" of Commercial Code provisions "may be varied by agreement, except as otherwise provided in this code." (U.C.C. 1102(3); see *San Diego Gas & Elec. Co. v. Bank Leumi* (1996) 42 C.A.4th 928, 935, 50 C.R.2d 20, 4 Summary (10th), *Negotiable Instruments*, §142 [where letter of credit expressly provided that it was subject to Uniform Customs and Practice for Documentary Credits (UCP), UCP had force of law even though it is not law but rather record of customs and practice].) Many sections of the Code contain the phrase "unless otherwise agreed" or similar words. The absence of such language in other provisions does not imply that the effect of those provisions cannot be varied by agreement. (U.C.C. 1102(4), and see Official Comment 3; 52 Cal. L. Rev. 289.)

(2) *No Disclaimer of Affirmative Obligations.* The parties cannot by agreement disclaim the obligations of good faith, diligence, reasonableness, and care as prescribed by the Code. They may, however, establish standards for measuring performance of these obligations so long as those standards are not "manifestly unreasonable." (U.C.C. 1102(3); see *Shea-Kaiser-Lockheed-Healy v. Department of Water & Power of Los Angeles* (1977) 73 C.A.3d 679, 689, 140 C.R. 884 [obligation of reasonableness may not be disclaimed].)

(3) *Fixing Reasonable Time.* When the Code requires action to be taken within a reasonable time, this may be fixed by agreement, so long as it is not "manifestly unreasonable." (U.C.C. 1204(1).)

West's Key Number Digest, Sales k.89

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Varying the Effect of Code Provisions.* The portions of U.C.C. 1102(3), (4) relating to the parties' right to vary the effect of code provisions were repealed and replaced in 2006 by U.C.C. 1302(a), (c) without substantive change.

(2) *No Disclaimer of Affirmative Obligations.* The portion of U.C.C. 1102(3) specifying obligations that may not be disclaimed was repealed and replaced in 2006 by U.C.C. 1302(b) without substantive change.

(3) *Fixing Reasonable Time.* U.C.C. 1204(1), on the timeliness of action, was repealed and replaced in 2006 by U.C.C. 1205. Under U.C.C. 1205(a), whether a time for taking an action required by the Code is reasonable depends on the nature, purpose, and circumstances of the action. Under U.C.C. 1205(b), an action is taken "seasonably" if it is taken at or within the time agreed, or if there is no agreed time, at or within a reasonable time.



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C. Uniform Commercial Code.

6. Definitions.

a. In General.

4 Witkin Sum. Cal. Law Sales § 14

[§ 14] In General.

The Code contains a great many definitions of terms used in special senses. Those definitions applicable generally to all subjects are in U.C.C. 1201. Special definitions applicable to particular subjects are set forth in the divisions relating to those subjects. U.C.C. 2103, 2104 contain the special definitions relating to sales. (See *infra*, §15 et seq.; for special definitions relating to other aspects of commercial law, see 4 *Summary* (10th), *Negotiable Instruments*, §9; 4 *Summary* (10th), *Secured Transactions in Personal Property*, §36; 9 *Summary* (10th), *Corporations*, §134 et seq.)

General definitions applicable to the entire Code are given for such terms as "agreement," "contract," "bill of lading," "buyer in ordinary course of business," "creditor," "document of title," "notice" and "knowledge," "purchase," and "security interest." (See U.C.C. 1201, and Official Comments.) The following general and special definitions are particularly important in the law of sales: "buyer" and "buying" (*infra*, §15), "value" (*infra*, §16), "notice" and "knowledge" (*infra*, §17), and "agreement" and "contract" (*infra*, §18).

SUPPLEMENT: [This section is current through the latest supplement]

U.C.C. 1201, setting forth the definitions generally applicable throughout the Code, was extensively revised in 2006. The definitions of "notice" and "knowledge" were moved to U.C.C. 1202.



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b. Buyer and Buying.

4 *Witkin Sum. Cal. Law Sales* § 15

[§ 15] Buyer and Buying.

(1) *Buyer in Ordinary Course of Business.* This term refers to "a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices. A person that sells oil, gas, or other minerals at the wellhead or minehead is a person in the business of selling goods of that kind." (U.C.C. 1201(9); see 73 *A.L.R.3d* 338 [who is "person in business of selling goods of that kind" within Unif.Com.C. §1-201(9)]; 87 *A.L.R.3d* 11 [who is "buyer in ordinary course of business" within Unif.Com.C. §1-201(9)]; 2 *Proof of Facts* 2d 165 [status as buyer in ordinary course of business].)

The section leaves some doubt whether a pawnbroker can ever be a buyer in ordinary course of business or whether a purchase from a pawnbroker can ever result in the purchaser being a buyer in the ordinary course of business. (See 1 *Anderson* 3d (2003 Rev. ed.), §1-201:135.)

(2) *Buying.* This may be "for cash, by exchange of other property, or on secured or unsecured credit," and includes acquiring goods or documents of title under a preexisting contract for sale. However, the buyer must take possession of the goods or have a right to recover the goods from the seller under U.C.C. 2101 et seq. Acquiring goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt does not qualify. (U.C.C. 1201(9).)

West's Key Number Digest, Sales k.1.5

SUPPLEMENT: [This section is current through the latest supplement]



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c. Value.

4 Witkin Sum. Cal. Law Sales § 16

[§ 16] Value.

(1) *Former Law.* Under the former Sales Act, "value" was any consideration sufficient to support a simple contract. *An antecedent or preexisting claim*, whether for money or not, constituted value where goods or documents of title were taken either in satisfaction of the claim or as security for it. (Former C.C. 1796.) This was the mercantile theory which was followed in the other Uniform Acts, and established as the rule in California prior to the Sales Act. (See *Schumann-Heink & Co. v. United States Nat. Bank* (1930) 108 C.A. 223, 234, 291 P. 684, 292 P. 547.)

(2) *Commercial Code.* The Code gives special definitions for "value" with respect to negotiable instruments (see U.C.C. 3303, 4 *Summary* (10th), *Negotiable Instruments*, §29), and the security interest of a collecting bank (see U.C.C. 4210, 4211, 4 *Summary* (10th), *Negotiable Instruments*, §106). Except as so provided, under U.C.C. 1201(43), "value" is given for rights that are acquired:

"(a) In return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not a chargeback is provided for in the event of difficulties in collection."

"(b) As security for, or in total or partial satisfaction of, a preexisting claim."

"(c) By accepting delivery pursuant to a preexisting contract for purchase."

"(d) Generally, in return for any consideration sufficient to support a simple contract." (On sufficient consideration, see 1 *Summary* (10th), *Contracts*, §208 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Commercial Code.* U.C.C. 1201(43), defining "value," was renumbered U.C.C. 1204 in 2006 without substantive change.



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d. Notice and Knowledge.

4 *Witkin Sum. Cal. Law Sales* § 17

[§ 17] Notice and Knowledge.

Knowledge is used in the Commercial Code in the strict sense of actual knowledge as opposed to reason to know. (See U.C.C. 1201(25)(c); 1 Anderson 3d (2003 Rev. ed.), §1-201:288 et seq.) *Notice* is a broader term. A person has notice of a fact if he or she either has actual knowledge of it, or has received a notice or notification of it, or "[f]rom all the facts and circumstances known to him or her at the time in question, he or she has reason to know that it exists." (U.C.C. 1201(25).) (On what constitutes giving and receiving notice, see U.C.C. 1201(26).)

To "discover" or "learn" a fact is to have actual knowledge of it rather than reason to know. (See U.C.C. 1201(25)(c).)

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SUPPLEMENT: [This section is current through the latest supplement]

U.C.C. 1201(25), defining "knowledge," was renumbered U.C.C. 1202(b) in 2006. U.C.C. 1201(26), on giving and receiving notice, was renumbered U.C.C. 1202(d), (e) in 2006. U.C.C. 1201(25)(c), defining "discover" and "learn," was renumbered U.C.C. 1202(c) in 2006. None of these renumberings involved substantive change.



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e. Agreement and Contract.

4 Witkin Sum. Cal. Law Sales § 18

[§ 18] Agreement and Contract.

The Commercial Code draws a distinction between "agreement" and "contract." An "agreement" is the bargain of the parties in fact as determined from their language or by implication from other circumstances. (U.C.C. 1201(3).) A "contract" is the total legal obligation resulting from that agreement. (U.C.C. 1201(3), (11); see 1 Anderson 3d (2003 Rev. ed.), §1-201:18 et seq.; 1 *Summary* (10th), *Contracts*, §§1, 2.) In Division 2 of the Commercial Code, "unless the context otherwise requires 'contract' and 'agreement' are limited to those relating to the present or future sale of goods." (U.C.C. 2106(1); see *infra*, §22.)

SUPPLEMENT: [This section is current through the latest supplement]



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7. Other General Provisions.

4 Witkin Sum. Cal. Law Sales § 19

[§ 19] Other General Provisions.

The Code introduces a number of innovations that are not easily classified under one conventional subject heading, and are discussed at various places in this work. Among them are:

(1) *Conflict of Laws: Free Choice of Law*. With a number of specified exceptions (see U.C.C. 1105(2)), the parties are given free choice of the law to govern a multistate transaction or one involving foreign trade: "[W]hen a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties." (U.C.C. 1105(1), and see Official Comments 1, 3, 5.) "Failing such agreement this code applies to transactions bearing an appropriate relation to this state." (U.C.C. 1105(1), and see Official Comment 2.)

(2) *Obligation of Good Faith*. "Every contract or duty within this code imposes an obligation of good faith in its performance or enforcement." (U.C.C. 1203, and see Official Comment; 47 *Hastings L. J.* 585 [proposing standards for determining when covenant of good faith has been violated]; C.E.B., 1 UCC Sales and Leases, §1.21; 67 *Am.Jur.2d* (2003 ed.), Sales §13; on good faith required of a merchant, see *infra*, §28.)

(3) *Performance or Acceptance Under Reservation of Rights*. "A party who, with explicit reservation of rights, performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as 'without prejudice,' 'under protest' or the like are sufficient." (U.C.C. 1207(a).) (See *Shea-Kaiser-Lockheed-Healy v. Department of Water & Power of Los Angeles* (1977) 73 C.A.3d 679, 690, 140 C.R. 884; *Connecticut Printers v. Gus Kroesen* (1982) 134 C.A.3d 54, 59, 60, 184 C.R. 436, 1 Summary (10th), Contracts, §952; 15 Southwestern U. L. Rev. 791.) However, U.C.C. 1207(a) does not apply to an accord and satisfaction. (U.C.C. 1207(b); see 33 *Loyola L.A. L. Rev.* 1.)

(4) *Option To Accelerate at Will*. "A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral 'at will' or 'when he deems himself insecure' or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised." (U.C.C. 1208; see 85 *A.L.R.4th* 284 [what constitutes "good faith" under Unif.Com.C. §1-208].)

(5) *Remedy by Action*. "Any right or obligation declared by this code is enforceable by action unless the provision declaring it specifies a different and limited effect." (U.C.C. 1106(2).)

(6) *Damages*. Strictness in calculating damages is to be avoided: The aggrieved party should be put "in as good a position as if the other party had fully performed." But "neither consequential or special nor penal damages may be had except as specifically provided in this code or by other rule of law." (U.C.C. 1106(1), and see Official Comment 1.)

(7) *Waiver or Renunciation*. "Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party." (U.C.C. 1107, and see Official Comment.)

(8) *Presumptions*. Presumptions established by the Code affect only the burden of producing evidence, except as otherwise provided in U.C.C. 1202. (U.C.C. 1210.) U.C.C. 1202 treats the presumption of authenticity of a third party's document. It provides that a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, "or any other document authorized or required by the contract to be issued by a third party," is admissible as evidence of the facts stated therein, "in any action arising out of the contract which authorized or required the document." Such a document, in due form, is presumed to be authentic and genuine, and if found authentic and genuine, the facts stated therein are presumed to be true. (U.C.C. 1202.) (See 72 A.L.R.3d 1243 [Unif.Com.C. §1-202]; 1 Cal. Evidence (4th), Burden of Proof and Presumptions, §105.)

(9) *Severability*. The Code contains the standard severability clause to apply in the event any provision is held invalid. (See U.C.C. 1108, and Official Comment.)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Conflict of Laws: Free Choice of Law*. U.C.C. 1105(2), on the parties' freedom to choose the applicable law, was renumbered U.C.C. 1301(a) in 2006 without substantive change.

U.C.C. 1105(1), on applicability of the code absent an agreement to the contrary, was amended and renumbered U.C.C. 1301(b) in 2006. The amended subdivision states: "In the absence of an agreement effective under subdivision (a) ... this code applies to transactions bearing an appropriate relation to this state."

(2) *Obligation of Good Faith*. U.C.C. 1203, on the obligation of good faith, was amended and renumbered U.C.C. 1304 in 2006. The amendment replaced "or enforcement" with "and enforcement."

(3) *Performance or Acceptance Under Reservation of Rights*. U.C.C. 1207(a), (b), on performance or acceptance under a reservation of rights, were renumbered U.C.C. 1308(a), (b), respectively, in 2006 without substantive change.

(4) *Option To Accelerate at Will*. U.C.C. 1208, on the option to accelerate or require additional collateral, was repealed and replaced in 2006 by U.C.C. 1309, which reads substantially the same as the language quoted in the text, with minor changes to achieve gender neutrality. (5) *Remedy by Action*. U.C.C. 1106(2), providing for a remedy by action, was renumbered U.C.C. 1305(b) in 2006 without substantive change.

(6) *Damages*. U.C.C. 1106(1), on the recoverability of various types of damages, was renumbered U.C.C. 1305(a) in 2006 without substantive change.

(7) *Waiver or Renunciation*. U.C.C. 1107, on the discharge of a claim by waiver or renunciation, was amended and renumbered U.C.C. 1306 in 2006. The amended statute provides: "A claim or right arising out of an alleged breach may be discharged in whole or in part without consideration by agreement of the aggrieved party in an authenticated record."

(8) *Presumptions*. U.C.C. 1202, on the presumption of authenticity of a third party's document, was renumbered

U.C.C. 1307 in 2006 without substantive change.

U.C.C. 1210 was repealed in 2006. Under U.C.C. 1206, added in 2006, when the Code creates a presumption or provides that a fact is presumed, "the trier of fact must find the existence of the fact unless and until evidence is introduced that supports a finding of its nonexistence."

(9) *Severability*. U.C.C. 1108, on severability, was renumbered U.C.C. 1105 in 2006 without substantive change.



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8. Continuing Vitality of Code.

4 *Witkin Sum. Cal. Law Sales* § 20

[§ 20] Continuing Vitality of Code.

(1) *Ongoing Revision*. In the years since the original Code was approved, a number of divisions of the Code have undergone substantial revision. A completely revised Article 3, for example, was approved in 1990 and adopted, as Division 3, by the California Legislature in 1992. (See 4 *Summary* (10th), *Negotiable Instruments*, §3.) An extensive revision of Article 2 was under consideration for many years. (See C.E.B., 1 UCC Sales and Leases, §1.2; 28 *Loyola L.A. L. Rev.* 191 [suggestions for revision of Division 2]; 32 *U.C. Davis L. Rev.* 17 [criticizing draft revisions].) Ultimately, a number of more modest changes were approved by the National Conference of Commissioners on Uniform State Laws in 2002 and by the American Law Institute in 2003. (See 44 *Santa Clara L. Rev.* 561.)

(2) *Symposia*. A Symposium published in the *Loyola of Los Angeles Law Review* in 1993 considered the vitality of the Uniform Commercial Code as of that date. Distinguished commercial law scholars presented their perspectives on such topics as drafting and enactment, the performance of the Code in light of historical criticisms, the relationship of the U.C.C. to other laws and to technological advances, the Code's coverage, and attitudes toward the Code. (See 26 *Loyola L.A. L. Rev.* 543 et seq.)

A less extensive symposium, focusing on long-term efforts to revise Article 2, was published in the *Hastings Law Journal* in 2001. (See 52 *Hastings L. J.* 603.)

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D. Other Statutes Regulating Sales.

4 Witkin Sum. Cal. Law Sales § 21

[§ 21] Other Statutes Regulating Sales.

A number of specialized statutes are addressed to particular areas of *consumer sales*, e.g., retail installment sales (infra, §263 et seq.), motor vehicle sales (infra, §235 et seq.), and contracts for home improvement and swimming pool construction (infra, §290 et seq.).

Consumer protection laws aid the consumer in a variety of ways: the establishment of a Department of Consumer Affairs (infra, §295); authorization of consumer class actions (infra, §296); required disclosure of credit file information (infra, §297); regulation of credit service organizations (infra, §309 et seq.); protection against fraudulent solicitation (infra, §328) and door-to-door sales (infra, §329 et seq.); and regulation of repair services (infra, §332 et seq.). (For many other special statutes, see infra, §336 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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A. Definitions.

1. Contract for Sale of Goods.

a. Sales and Sales Contracts.

4 *Witkin Sum. Cal. Law Sales* § 22

[§ 22] Sales and Sales Contracts.

(1) *Sale and Present Sale.* The Sales Act defined a "sale" of goods as "an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price." (Former C.C. 1721(2); see *Reiter v. Anderson* (1927) 87 C.A. 642, 648, 262 P. 415; *People v. Wolin* (1931) 119 C.A. Supp. 770, 772, 2 P.2d 60; *Thomas v. Buttress & McClellan* (1956) 141 C.A.2d 812, 816, 297 P.2d 768; 5 So. Cal. L. Rev. 248.)

A "sale" under the Commercial Code "consists in the passing of title from the seller to the buyer for a price." (U.C.C. 2106(1).) (See *H. Russell Taylor's Fire Prevention Service v. Coca Cola Bottling Corp.* (1979) 99 C.A.3d 711, 723, 160 C.R. 411, *infra*, §213; 2 Anderson 3d (2004 Rev. ed.), §2-106:11; 1 Williston on Sales (5th), §5-3; BAJI, No. 9.41; 4 A.L.R.4th 85 [what constitutes transaction, contract for sale, or sale]; 5 A.L.R.4th 501 [applicability of Uniform Commercial Code to mixed contracts for sale of goods and services]; on passage of title, see *infra*, §124 et seq.) The narrower term, "present sale," is used to describe a "sale which is accomplished by the making of the contract." (U.C.C. 2106(1); see 67 *Am.Jur.2d* (2003 ed.), *Sales* §§23, 24.)

(2) *Contract To Sell and Contract for Sale.* Under the Sales Act, a "contract to sell" was distinguished from a "sale," and was defined as a "contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price." (Former C.C. 1721(1).) The distinction between a *sale* and a *contract to sell* was that the sale was a *present executed transfer* of the title to goods, and the *contract to sell* was an agreement to transfer them at some future time. (See *Rosenberg Bros. & Co. v. Beales* (1922) 56 C.A. 212, 214, 205 P. 18.)

Under the Code, a "contract to sell" also refers to future transfers. (See U.C.C. 2106(1).) A new term, "contract for sale," is used when it is not necessary to distinguish between transactions which immediately transfer title and those which provide for passage of title in the future. U.C.C. 2106(1) defines a "contract for sale" as including "both a present sale of goods and a contract to sell goods at a future time." (See Official Comment 1; 2 Anderson 3d (2004 Rev. ed.), §2-106:32; 78 A.L.R.3d 696 [what constitutes contract for sale for purposes of warranty of merchantability]; 67 *Am.Jur.2d* (2003 ed.), *Sales* §23 et seq.)

(3) *Bill of Sale.* The common term "bill of sale" refers to a written instrument sometimes used to evidence a sale. (*Hull v. Ray* (1926) 80 C.A. 284, 289, 251 P. 810.) The term is not used in the Commercial Code. (See Cal.

Transactions Forms, 1 Business Transactions §3:71.)

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1. Contract for Sale of Goods.

b. Goods.

1. In General.

4 Witkin Sum. Cal. Law Sales § 23

[§ 23] In General.

The Commercial Code definition of "goods" includes all things that are movable at the time they are identified to the contract for sale. (See U.C.C. 2105(1); 2 Anderson 3d (2004 Rev. ed.), §2-105:8 et seq.; 48 A.L.R.3d 1060 [electricity, gas, or water furnished by public utility as "goods"]; 4 A.L.R.4th 912 [what constitutes "goods" within Unif.Com.C. Article 2]; 30 U.C. Davis L. Rev. 543 [arguing that water is not a good and should not be subject to U.C.C. implied warranty provisions]; BAJL, No. 9.42 ["goods" means any personal property]; 67 Am.Jur.2d (2003 ed.), Sales §215 et seq.)

The term includes:

(1) Specially manufactured goods. (U.C.C. 2105(1).)

(2) The unborn young of animals. (U.C.C. 2105(1).)

(3) Timber that is to be cut. (U.C.C. 2105(1), 2107(2); see *infra*, §26.)

(4) Growing crops and "other identified things" that are attached to realty but capable of severance without material harm to it. (U.C.C. 2105(1), 2107(2); see *infra*, §26.)

(5) Minerals or the like (including oil and gas) or a structure or its materials, provided that such articles are to be severed by the seller. (U.C.C. 2105(1), 2107(1); see *infra*, §26.)

U.C.C. 2105(1) expressly excludes: (1) money in which the price is to be paid (*infra*, §31); (2) investment securities (9 *Summary* (10th), *Corporations*, §132 et seq.); and (3) things in action (*infra*, §31). (See U.C.C. 2105(1), Official Comment 1; 2 Anderson 3d (2004 Rev. ed.), §2-105:66 et seq.)

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SUPPLEMENT: [This section is current through the latest supplement]

See *Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 C.A.4th 1171, 1186, 80 C.R.3d 6 [agreement by which Internet marketer would solicit subscribers for home delivery of newspaper by means of "pop up ads" was not subject to Commercial Code because agreement was for services, not goods].



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 - b. Goods.
2. Existing and Future Goods.
 - aa. Former Law and Commercial Code.

4 Witkin Sum. Cal. Law Sales § 24

[§ 24] Former Law and Commercial Code.

(1) *Common Law*. The doctrine of *potential possession* permitted a *present sale* (not merely an agreement to sell) of goods that were *not in existence*, but that had potential existence as the natural product or expected increase of something already in existence and in the possession of the seller. This included, e.g., the unborn young of animals, and crops to be grown on land where the seller possessed the animals or land. (See *Western Oil & Refining Co. v. Venago Oil Corp.* (1933) 218 C. 733, 738, 739, 24 P.2d 971; *Hamilton v. Klinke* (1919) 42 C.A. 426, 431, 183 P. 675; *Hogue-Kellogg Co. v. Baker* (1920) 47 C.A. 247, 249, 190 P. 493; *Rosenberg Bros. & Co. v. Beales* (1922) 56 C.A. 212, 215, 205 P. 18; *Sun-Maid Raisin Growers of Calif. v. Jones* (1929) 96 C.A. 650, 653, 654, 274 P. 557; 9 Cal. L. Rev. 76; 10 Cal. L. Rev. 352.)

(2) *Sales Act*. The Sales Act allowed a present sale of existing goods (owned or possessed by the seller) but not of future goods (to be manufactured or acquired by the seller). Future goods, whether in potential possession or not, could be the subject only of a contract to sell, and an attempted present sale operated as a contract to sell the goods when the seller acquired them. (See former C.C. 1725; 9 Cal. L. Rev. 29.)

(3) *Commercial Code*. "Goods must be both existing and identified before any interest in them can pass." (U.C.C. 2105(2); on identification, see *infra*, §§25, 127.) Goods that do not meet these requirements are "future goods." (U.C.C. 2105(2).) There can be no present sale of future goods; a purported present sale of such goods or of any interest in them operates only as a contract to sell. (U.C.C. 2105(2); for a similar rule under the Sales Act, see *infra*, §25.)

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b. Goods.

2. Existing and Future Goods.

bb. Appropriation and Identification.

4 Witkin Sum. Cal. Law Sales § 25

[§ 25] Appropriation and Identification.

(1) *Sales Act: Appropriation of Future Goods.* Title to specific goods passed when they were put into a deliverable state. (See *infra*, §127.) But under a contract to sell future goods, it was also necessary to "appropriate" such goods to the contract. Appropriation was the seller's performance of the contract; it was an act which, with the buyer's assent, transferred title to the goods. (See former C.C. 1739, Rule 4(1); *Fischer v. Means* (1948) 88 C.A.2d 137, 143, 198 P.2d 389; cf. former C.C. 1725(3) [title passed without appropriation under purported present sale of future goods if parties so intended].)

(2) *Commercial Code: Identification.* Under the Code, goods must be identified as well as existing (see *supra*, §24) in order for any interest in them to pass. (U.C.C. 2105(2); see 3A Anderson 3d (2002 Rev. ed.), §2-501:6 et seq. [identification of goods].)

The Code concept of identification is similar to the appropriation of the Sales Act; it is the specification of "existing goods as goods to which the contract refers." (See U.C.C. 2501(1), and Official Comment 2; 3A Anderson 3d (2002 Rev. ed.), §2-501:1; 67 *Am.Jur.2d* (2003 ed.), *Sales* §368.) However, appropriation passed title to the goods, while identification does not necessarily have this effect. For example, the parties may, by agreement, specify a different time and manner of passage of title, or delay passage of title until the goods are delivered. (See U.C.C. 2401(1), (2); 3A Anderson 3d (2002 Rev. ed.), §2-401:51 et seq.; *infra*, §125.)

The Commercial Code provides for the manner of identifying existing goods and future goods (*infra*, §127), agreement of the parties specifying the manner and time of identification (*infra*, §125), and the effect of identification upon the insurable interests of the parties (*infra*, §141).

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1. Contract for Sale of Goods.

b. Goods.

3. Goods To Be Severed.

4 Witkin Sum. Cal. Law Sales § 26

[§ 26] Goods To Be Severed.

(1) *Severance by Seller.* Sales of certain things to be removed from the land are treated as sales of goods within the provisions of Division 2 only if they are to be severed by the seller. Included in this classification are "minerals or the like (including oil and gas) or a structure or its materials." (U.C.C. 2107(1).) Until severance, the goods cannot be the subject of a present sale; a purported present sale that is ineffective as a transfer of an interest in land may be effective only as a contract to sell. (See U.C.C. 2107(1).)

A contract providing for severance of such things by the buyer is one affecting realty and is not subject to the Commercial Code. (See U.C.C. 2107, Official Comment 1.)

(2) *Severance by Seller or Buyer.* Other things may be sold apart from the land within the provisions of Division 2 regardless of whether severance is to be by the seller or the buyer. These are "growing crops or other things attached to realty and capable of severance without material harm thereto." Severance may be by the seller or the buyer and "the parties can by identification effect a present sale before severance." (U.C.C. 2107(2); see 2 Anderson 3d (2004 Rev. ed.), §2-107:6 et seq.)

The Code avoids the term "fixtures," which the drafters felt to be too diversely defined to be serviceable. (U.C.C. 2107, Official Comment 2.)

Civil Code sections 658 and 660, on the nature of property, state that "for the purposes of sale, emblements, industrial growing crops and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale, shall be treated as goods and be governed by the provisions of the title of this code regulating the sales of goods." U.C.C. 2107(2), however, adds the requirement of severance without material harm.

(3) *Timber To Be Cut.* Under pre-Code law, a sale of standing timber to be severed within a fixed time or within a reasonable time was a sale of goods. (*Ascherman v. McKee* (1956) 143 C.A.2d 277, 282, 299 P.2d 367; see 13 *Summary* (10th), *Personal Property*, §93.) The Official Text of the Commercial Code formerly classified the contract as one for the sale of goods only if severance was to be by the seller. (See 1 U.L.A. (Master Ed.), §2-107(1), p. 382 [statute prior

to 1972 amendment].) California rejected this position, and classified a sale of timber to be cut as a sale of goods regardless of whether severance is by the seller or buyer, and even though the timber forms part of the realty at the time of contracting. (U.C.C. 2107(2).)

(4) *Application of Recording Laws.* The provisions on the sale of goods to be severed are subject to any rights of third parties as specified in the laws relating to realty records. (U.C.C. 2107(3); see 12 *Summary* (10th), *Real Property*, §318.) The contract for sale of the goods "may be executed and recorded in the same manner as a document transferring an interest in land and shall then constitute notice to third parties of the buyer's rights under the contract for sale." (U.C.C. 2107(3), and see Official Comment 2.)

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SUPPLEMENT: [This section is current through the latest supplement]



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A. Definitions.

1. Contract for Sale of Goods.

b. Goods.

4. Lot and Commercial Unit.

4 Witkin Sum. Cal. Law Sales § 27

[§ 27] Lot and Commercial Unit.

A "lot" is "a parcel or a single article which is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract." (U.C.C. 2105(5); see 2 Anderson 3d (2004 Rev. ed.), §§2-105:15, 2-105:16.)

A "commercial unit" of goods is a quantity which, by commercial usage, is a single whole for purposes of sale; it is a quantity which cannot be divided without materially impairing its "character or value on the market or in use." (U.C.C. 2105(6); see 2 Anderson 3d (2004 Rev. ed.), §§2-105:15, 2-105:17.) A commercial unit may be a single article, as a machine; a group of articles, as a suite of furniture; or a quantity, as a bale, gross, or carload, so long as it is treated in use or in the relevant market as a single whole. (U.C.C. 2105(6).)

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A. Definitions.
2. Merchant.

4 *Witkin Sum. Cal. Law Sales* § 28

[§ 28] Merchant.

(1) *General Definition.* "Merchant," a term of great significance, is defined as "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction." (U.C.C. 2104(1); see *Sacramento Regional Transit Dist. v. Grumman Flexible* (1984) 158 C.A.3d 289, 295, 204 C.R. 736 [both plaintiff transit district and defendant manufacturer, from whom plaintiff bought buses, were merchants within meaning of U.C.C. 2104(1), and thus bus sale transaction, including liability for defects, was governed by U.C.C. rather than tort law]; 10 U.C.L.A. L. Rev. 1092; 16 *Hastings L. J.* 552; C.E.B., 1 UCC Sales and Leases, §1.24; 2 Anderson 3d (2004 Rev. ed.), §2-104:20 et seq.; 67 *Am.Jur.2d* (2003 ed.), *Sales* §64 et seq.; 95 *A.L.R.3d* 484 [farmer as merchant].)

(2) *"Agent or Broker" Clause.* A person or organization may be classified as a merchant if the requisite knowledge or skill can be attributed to that person or organization because of the employment of "an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill." (U.C.C. 2104(1).) The "agent or broker" clause means that even a nonprofit institution (such as a university) can be a "merchant" if it has a regular purchasing department or personnel familiar with business practices and equipped to act. (See Official Comment 3.)

(3) *Between Merchants.* A transaction is "between merchants" when both parties to it are chargeable with the knowledge or skill of merchants. (U.C.C. 2104(3).)

(4) *Special Rules Applicable to Merchants.* The Code "assumes that transactions between professionals in a given field require special and clear rules which may not apply to a casual or inexperienced seller or buyer." (U.C.C. 2104, Official Comment 1.) Accordingly, it contains three kinds of special provisions applicable to merchants and between merchants: Those relating to the statute of frauds, firm offers, and confirming memoranda (applicable to almost every person in business); those relating to the warranty of merchantability (applicable to a smaller group of persons dealing with particular goods; see *infra*, §69); and those relating to "good faith" of merchants, defined in U.C.C. 2103(1)(b) as requiring "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade" (applicable to a broad class). (See U.C.C. 2104, Official Comment 2.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Special Rules Applicable to Merchants.* U.C.C. 2103(1)(b) was repealed in 2006. Under U.C.C. 1201(20), as

amended in 2006, except as otherwise provided in U.C.C. 5101 et seq., good faith "means honesty in fact and the observance of reasonable commercial standards of fair dealing."



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A. Definitions.

3. Financing Agency.

4 *Witkin Sum. Cal. Law Sales* § 29

[§ 29] Financing Agency.

A "financing agency" is a *bank, finance company or other person* who (1) "in the ordinary course of business makes advances against goods or documents of title," or (2) "by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale." (U.C.C. 2104(2); see 2 *Anderson* 3d (2004 Rev. ed.), §2-104:12 et seq.; 67 *Am.Jur.2d* (2003 ed.), *Sales* §16.) A *bank or other person* who similarly intervenes between persons in the position of seller and buyer (see U.C.C. 2707) is also a financing agency. (U.C.C. 2104(2).)

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A. Definitions.

4. Termination and Cancellation.

4 Witkin Sum. Cal. Law Sales § 30

[§ 30] Termination and Cancellation.

A contract for the sale of goods is *terminated* by either party when he or she puts an end to the contract otherwise than for its breach "pursuant to a power created by agreement or law." Termination discharges all obligations which are executory on both sides but does not affect any right which is based on prior performance or breach. (U.C.C. 2106(3).)

A contract for the sale of goods may be *cancelled* by either party upon a breach by the other. Rights and obligations are treated as under a terminated agreement but the cancelling party additionally retains any remedies available under law either for breach of the whole contract or of any unperformed balance. (U.C.C. 2106(4); see C.E.B., 1 UCC Sales and Leases, §4.81; C.E.B., 2 UCC Sales and Leases, §16.36; 67 *Am.Jur.2d* (2003 *ed.*), *Sales* §17 et seq.; 67A *Am.Jur.2d* (2003 *ed.*), *Sales* §798.)

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SUPPLEMENT: [This section is current through the latest supplement]



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B. Applicability of Division 2 to Particular Transactions.

4 Witkin Sum. Cal. Law Sales § 31

[§ 31] Applicability of Division 2 to Particular Transactions.

(1) *In General*. "Unless the context otherwise requires, this division applies to transactions in goods." (U.C.C. 2102.) The choice of the word "transactions" has prompted discussion of the applicability of Division 2 to a broader range of business activity than traditional sales of goods. (See 67 *Am.Jur.2d* (2003 ed.), *Sales* §63; 48 *A.L.R.3d* 668 [application of warranty provisions to bailments]; 4 *A.L.R.4th* 85 [what constitutes transaction]; 2 Anderson 3d (2004 Rev. ed.), §2-102:6 et seq.)

(2) *Choses in Action*. The definition of "goods" in Division 2 expressly excludes "things in action." (See U.C.C. 2105(1); cf. former C.C. 1796 [same exclusion in Sales Act].) Hence, unless a particular chose in action is a negotiable instrument subject to Division 3 (Negotiable Instruments), or unless it is otherwise subject to the provisions of either Division 7 (Warehouse Receipts, Bills of Lading and Other Documents of Title) or Division 8 (Investment Securities), it would appear that the common law applies. (See *Porter v. Gibson* (1944) 25 *C.2d* 506, 514, 154 *P.2d* 703 [sale of shares of stock not governed by Sales Act]; *Franck v. J.J. Sugarman-Rudolph Co.* (1952) 40 *C.2d* 81, 87, 251 *P.2d* 949 [same].)

The *statute of frauds* of the superseded Sales Act *did* cover choses in action even though the Act itself did not. This coverage was not continued in the Commercial Code's statute of frauds for sales (see U.C.C. 2201, West's California Code Comments), but is provided by the statute of frauds applicable to other personal property (see U.C.C. 1206, 1 *Summary* (10th), *Contracts*, §384).

(3) *Money*. The Sales Act excluded money from its definition of "goods." (Former C.C. 1796.) Division 2 of the Code excludes only "the money in which the price is to be paid." (See U.C.C. 2105(1).) Money sold as a commodity (e.g., foreign currency) is not excluded. (See U.C.C. 2105, Official Comment 1.)

(4) *Secured Transactions*. The Sales Act did not apply to any transaction in the form of a contract to sell or a sale which was intended to operate by way of mortgage, pledge, charge or other security. (Former C.C. 1795.) Division 2 similarly "does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction." (U.C.C. 2102; on applicability of Division 9 to certain security interests arising under Division 2, see U.C.C. 9110.) Division 2 does apply to the sales aspects of a transaction which involves both a sale of goods and the creation of a security interest. (U.C.C. 2102, Official Comment; see 2 Anderson 3d (2004 Rev. ed.), §2-102:16; *infra*, §131 et seq.)

(5) *Interests in Realty*. Division 2 clearly does not apply to leases of real property. (See U.C.C. 2102.) But California cases have applied the law of sales to *assignments* of such leases, which are "chattels real." (See *J.S. Potts Drug Co. v. Benedict* (1909) 156 C. 322, 328, 104 P. 432.) And a contract may be one for the sale of goods even though the price is an interest in realty. (See *infra*, §46.)

(6) *Conflicting Sales Statutes*. Division 2 of the Commercial Code does not "impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers." (U.C.C. 2102.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Choses in Action*. U.C.C. 1206, the statute of frauds applicable to other personal property, was repealed in 2006.



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A. Statute of Frauds.

4 Witkin Sum. Cal. Law Sales § 32

[§ 32] Statute of Frauds.

The Uniform Commercial Code statute of frauds applies to the "sale of goods for the price of five hundred dollars (\$ 500) or more." (U.C.C. 2201.) It thus continues the limit established under former C.C. 1624a. The general provisions of U.C.C. 2201 are treated elsewhere. (See 1 *Summary* (10th), *Contracts*, §378 et seq.; on sales of choses in action with a statute of frauds limit of \$ 5,000, see U.C.C. 1206, 1 *Summary* (10th), *Contracts*, §384; on enforceability of electronic contracts, see 1 *Summary* (10th), *Contracts*, §19; on repeal of writing requirement as to sale or purchase of securities, see 9 *Summary* (10th), *Corporations*, §135; and see 2 Williston on Sales (5th), §14-1 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

U.C.C. 1206, the statute of frauds applicable to sales of choses in action, was repealed in 2006.

C.C. 1624.5, added in 2006, imposes statute of frauds requirements on contracts for the sale of personal property where the "amount or value of remedy" exceeds \$ 5,000, but the statute is expressly made inapplicable to contracts governed by U.C.C. 2201. (C.C. 1624.5(b); see 1 *Summary* (10th), *Contracts*, Supp., §384.)



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B. Parol Evidence.

4 Witkin Sum. Cal. Law Sales § 33

[§ 33] Parol Evidence.

U.C.C. 2202 removes written agreements for the sale of goods from the operation of *C.C.P. 1856*, the general parol evidence statute.

Under U.C.C. 2202, evidence of a prior agreement or of a contemporaneous oral agreement is *not admissible to contradict* terms "with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein." But the terms of the agreement *may be explained or supplemented* by the following:

(1) *Course of dealing or usage of trade* as defined in U.C.C. 1205. (See *Balfour, Guthrie & Co., Ltd. v. Gourmet Farms* (1980) 108 C.A.3d 181, 188, 190, 166 C.R. 422 [introduction of trade usage is authorized without necessity of showing ambiguity].)

(2) *Course of performance* as defined in U.C.C. 2208 (see *infra*, §40).

(3) Evidence of *consistent additional terms* unless the court finds the writing, in addition to being intended as a final expression of the agreement, was also intended as a complete and exclusive statement.

A full discussion of the parol evidence rule and a comparison of U.C.C. 2202 with *C.C.P. 1856* is contained in another work. (See 2 *Cal. Evidence* (4th), *Documentary Evidence*, §59 et seq.)

West's Key Number Digest, Sales k.218.5-

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Course of dealing or usage of trade*: The definitions contained in U.C.C. 1205 were transferred to U.C.C. 1303 in 2006.

(2) *Course of performance*: U.C.C. 2208 was repealed in 2006, and U.C.C. 1303 was amended to include a definition of "course of performance." (See Supp., *supra*, §11.)



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C. Formation of Contract.
1. In General.

4 Witkin Sum. Cal. Law Sales § 34

[§ 34] In General.

(1) *Any Manner Showing Agreement.* "A contract for sale of goods may be made in any manner sufficient to show agreement." (U.C.C. 2204(1).) And a contract may be found to exist even though the exact moment of its making is undetermined. (U.C.C. 2204(2); see 1 Williston on Sales (5th), §7-1 et seq.; Cal. Civil Practice, 4 Business Litigation, §40:6 et seq.; 34 *San Diego L. Rev.* 1263, 1328 [contract formation on World Wide Web]; on offer and acceptance under the Code generally, see 67 *Am.Jur.2d* (2003 ed.), *Sales* §§100, 124 et seq.)

Conduct of both parties which recognizes the existence of the contract is sufficient (U.C.C. 2204(1), 2207(3)), even though their writings do not otherwise establish a contract (U.C.C. 2207(3)). (See *Steiner v. Mobil Oil Corp.* (1977) 20 C.3d 90, 141 C.R. 157, 569 P.2d 751, *infra*, §39; *National Controls v. Commodore Business Machines* (1985) 163 C.A.3d 688, 693, 209 C.R. 636; 2 Anderson 3d (2004 Rev. ed.), §2-204:34 et seq.) The contract consists of the "terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this code." (U.C.C. 2207(3).)

Where one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties intended to make a contract and there is "a reasonably certain basis for giving an appropriate remedy." (U.C.C. 2204(3).) Such a contract may be valid even though it leaves some particulars of performance to be specified by one of the parties. (U.C.C. 2311(1); see 1 *Summary* (10th), *Contracts*, §146 et seq.; on open price terms, see *infra*, §47.)

(2) *Illustrations.* In *Steiny & Co. v. California Elec. Supply Co.* (2000) 79 C.A.4th 285, 93 C.R.2d 920, plaintiff subcontractor's purchase order and defendant switchboard supplier's invoice contained materially different terms as to warranty, but the parties manifested the existence of a contract by their conduct. *Held*, under U.C.C. 2207(3) there was a contract consisting of terms on which the two writings agreed, supplemented by provisions of the *Code*. (79 C.A.4th 295.)

In *Transwestern Pipeline Co. v. Monsanto Co.* (1996) 46 C.A.4th 502, 53 C.R.2d 887, plaintiff, a corporation in the business of transporting natural gas, settled a claim against it for pipeline contamination and then sought equitable indemnity from the manufacturer of the contaminating product. A jury found the manufacturer partially responsible for the contamination and awarded damages accordingly, even though the manufacturer's invoices for sale of the product contained clauses disclaiming any liability for consequential damages and limiting the buyer's other damages to the

purchase price of the particular order. *Held*, affirmed; the liability limitation clauses never became part of the parties' purchase agreements.

(a) Defendant expressly conditioned its acceptance of plaintiff's orders on plaintiff's assent to the additional limitation of liability terms contained in the invoices; however, despite 12 years of purchases from defendant, plaintiff never expressly assented. Therefore, no contract was formed under U.C.C. 2207(1), (2) (see *infra*, §38), and the case is governed instead by U.C.C. 2207(3), *supra*. (46 C.A.4th 514, 515.)

(b) The supplementary terms referred to in U.C.C. 2207(3) may include terms incorporated as a result of the parties' course of dealing. Plaintiff's purchase orders, however, stated terms and conditions containing no limitations on defendant's liability. "Common sense tells us the mere exchange of forms containing inconsistent terms, for however long a period, cannot establish a common understanding between the parties as to which set of conflicting terms is part of their contract. ... [W]e see no reason why Monsanto's form disclaiming liability and limiting Texas Eastern's remedies should be accepted over Texas Eastern's form which contained no such limitations." (46 C.A.4th 516.)

(c) Incorporating defendant's liability limitations into the contract would be unfair for an additional reason. The limitations were intended to relieve defendant of otherwise well-established legal duties and obligations. "We do not believe a party charged with significant legal duties and responsibilities can reasonably rely on its boilerplate form, contradicted by the other party's boilerplate form, to shift substantial economic burdens from itself to the other party, especially where it created the ambiguity as to acceptance of its terms by not insisting on its terms when it had numerous opportunities to do so." (46 C.A.4th 518; on legality of liability limitations generally, see 1 *Summary* (10th), *Contracts*, §659 et seq.)

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C. Formation of Contract.
2. Firm Offer by Merchant.
a. In General.

4 Witkin Sum. Cal. Law Sales § 35

[§ 35] In General.

Although prior California law on options to buy or sell goods is apparently unchanged by the Uniform Commercial Code (see 1 *Summary* (10th), *Contracts*, §168 et seq.), a new concept, the "firm offer," has been added to mercantile negotiations. U.C.C. 2205(a) provides that a signed offer by a merchant (defined in U.C.C. 2104(1), *supra*, §28) is not revocable for lack of consideration, if by its terms it gives assurance that it will be held open. Thus, a merchant can extend a binding option without the formality of receiving a nominal consideration in return. (See C.E.B., 1 UCC Sales and Leases, §2.10 et seq.; 47 *Cal. L. Rev.* 83; 10 *Stanf. L. Rev.* 460 [firm offers by advertised bid contractors]; on firm offer by merchant to supply goods to licensed contractor, see *infra*, §36.)

A firm offer remains irrevocable for the time stated in the offer or, if no time is stated, for a "reasonable time." In either case any period of irrevocability cannot exceed 3 months. (U.C.C. 2205(a).)

Where the assurance of irrevocability is contained in a form supplied by the offeree, it must be separately signed by the offeror to constitute a firm offer. (U.C.C. 2205(a).)

West's Key Number Digest, Sales k.22(1)

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- C. Formation of Contract.
 - 2. Firm Offer by Merchant.
 - b. Firm Offer to Contractor.

4 Witkin Sum. Cal. Law Sales § 36

[§ 36] Firm Offer to Contractor.

The promissory estoppel theory of *Drennan v. Star Paving Co. (1958) 51 C.2d 409, 33 P.2d 757* (1 Summary (10th), *Contracts*, §250), was given expanded legislative approval in 1980 by the addition of subdivision (b) to U.C.C. 2205, providing for a period of irrevocability of an offer by a merchant to supply goods to a licensed contractor. (See *12 Pacific L. J.* 276; C.E.B., 1 UCC Sales and Leases, §2.16; Cal. Transactions Forms, 4 Business Transactions, §24.22.) The statute provides as follows:

- (1) The offer may be oral or written.
- (2) The merchant must have actual or imputed knowledge that the contractor is licensed, and that the offer will be relied on by the contractor in submitting its bid for a construction contract with a third party.
- (3) The offer relied on will be irrevocable for 10 days after the awarding of the contract to the prime contractor, but in no event for more than 90 days after the date the offer was rendered by the merchant; and the merchant may provide that the offer will be held open for *less than the time specified* in the statute.
- (4) An exception is made where there is an oral offer for a price of \$ 2,500 or more: The offer must be confirmed in writing by the contractor or the contractor's agent within 48 hours after it is rendered by the merchant, and failure to confirm in writing releases the merchant.

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C. Formation of Contract.
3. Form of Acceptance.

4 Witkin Sum. Cal. Law Sales § 37

[§ 37] Form of Acceptance.

(1) *In General.* U.C.C. 2206(1)(a) provides that an offer to buy or sell goods may be accepted in any manner and by any medium "reasonable in the circumstances" unless the terms of the offer or the circumstances unambiguously indicate otherwise. This provision eliminates the technical rules which formerly required that an acceptance be transmitted in the same manner as the offer, and substitutes a flexible rule adapted to modern communication practices. (See U.C.C. 2206, Official Comment 1; *31 Loyola L.A. L. Rev.* 325 [discussing "shrink-wrap license," whereby, on opening package, buyer learns of limitations on use of software and accepts them by using it].)

If commencing a requested performance is a "reasonable" method of acceptance, the offeree must give notice of acceptance within a "reasonable time." Otherwise, the offeror may treat the offer as having lapsed. (U.C.C. 2206(2).)

(2) *Shipment or Promise To Ship.* Unless otherwise unambiguously indicated by the language or circumstances, "[a]n order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment" of goods. (U.C.C. 2206(1)(b); see *67 Am.Jur.2d* (2003 ed.), *Sales* §137.) If acceptance is by shipment, the offeror should be notified within a reasonable time. (See U.C.C. 2206(2).)

If the seller ships goods that do not conform to the order or offer, the shipment constitutes an acceptance unless the seller "seasonably notifies the buyer that the shipment is offered only as an accommodation." (U.C.C. 2206(1)(b).) The Official Comment notes that a seller accepts an offer by shipment of nonconforming goods at the risk of being found to have accepted the offer and breached it by the same act. The Comment suggests that if there is any doubt as to the buyer's willingness to accept the nonconforming goods, the shipment should be accompanied by notice that it is nonconforming and offered as an accommodation. (U.C.C. 2206, Official Comment 4; see C.E.B., 1 UCC Sales and Leases, §2.42 et seq.)

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4. Additional Terms in Acceptance.

a. Modern Approach Supporting Formation of Contract.

4 Witkin Sum. Cal. Law Sales § 38

[§ 38] Modern Approach Supporting Formation of Contract.

(1) *Reversal of Traditional Rule.* U.C.C. 2207 completely reverses the basic rule of contract law that an acceptance containing additional terms is both a rejection of the offer and a counteroffer (see 1 *Summary* (10th), *Contracts*, §183). U.C.C. 2207(1) provides that an otherwise valid acceptance is operative "even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms." (See *Steiner v. Mobil Oil Corp.* (1977) 20 C.3d 90, 99, 141 C.R. 157, 569 P.2d 751, *infra*, §39; *PMC v. Porthole Yachts, Ltd.* (1998) 65 C.A.4th 882, 887, 76 C.R.2d 832 [seller's counterproposal to reduce purchase price of boat was not accepted by buyer, where buyer's agreement to price reduction was conditioned on seller granting extension of time for buyer to accept third party's inspection of boat]; C.E.B., 1 UCC Sales and Leases, §5.1 et seq. [suggested provisions in offers and acceptances subject to U.C.C. 2207]; 76 *Harv. L. Rev.* 1481 [criticizing federal court's construction of Unif.Com.C. 2-207]; 22 *A.L.R.4th* 939 [what constitutes acceptance "expressly made conditional"]; 67 *Am.Jur.2d* (2003 ed.), *Sales* §142 et seq.)

(2) *Operative Effect of Additional Terms.* The operative effect of the additional terms in an acceptance depends upon whether the negotiations are "between merchants." If the negotiations are *not between merchants*, the additional terms are construed as proposals for inclusion in the contract. (U.C.C. 2207(2); see 1 *Summary* (10th), *Contracts*, §186.) If, however, the offer and varying acceptance are *between merchants*, the additional terms automatically become a part of the contract unless (a) the offer expressly limited acceptance to its terms (U.C.C. 2207(2)(a)), (b) the contract would be materially altered (U.C.C. 2207(2)(b)), or (c) the offeror had previously indicated that such terms would be rejected, or gives notice of objection within a reasonable time after receiving them (U.C.C. 2207(2)(c)). (See Official Comment 3 et seq.; *Lockheed Electronics Co. v. Keronix* (1981) 114 C.A.3d 304, 310, 311, 170 C.R. 591 [offer expressly limiting acceptance to terms of offer under U.C.C. 2207(2)(a)]; *Kawasho Int., U.S.A. v. Lakewood Pipe Service* (1983) 152 C.A.3d 785, 792, 201 C.R. 640 [failure to notify of objection]; *National Controls v. Commodore Business Machines* (1985) 163 C.A.3d 688, 695, 209 C.R. 636 [new term is "material" if it would result in surprise or hardship if incorporated without express awareness by other party]; *Therma-Coustics Mfg. v. Borden* (1985) 167 C.A.3d 282, 296, 213 C.R. 611 [seller's invoice containing limitation of 1 year after action had accrued within which buyer could commence action under contract was not material alteration]; 72 *A.L.R.3d* 479 [what are "additional terms" that "materially alter" contract]; for definition of the term "between merchants," see U.C.C. 2104(3), *supra*, §28.)

In *Lounge-A-Round v. GCM Mills* (1980) 109 C.A.3d 190, 166 C.R. 920, plaintiff buyer sent defendant seller purchase orders providing for arbitration in California, and further specifying that none of the provisions of the order could be changed except by a writing signed by an authorized agent of the buyer. Defendant seller's acknowledgments contained a provision for arbitration in New York. *Held*, the latter provision did not become a part of the contract between the parties. Under U.C.C. 2207(2)(a) and (2)(c), where clauses on conforming forms conflict, each party is assumed to object to the other's clause. (109 C.A.3d 197.) (See 67 Cal. L. Rev. 317 [U.C.C. 2207 and commercial arbitration agreements].)

West's Key Number Digest, Sales k.22(4)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Operative Effect of Additional Terms*. See 33 *Pepperdine L. Rev.* 501 [approaches in determining whether clause limiting liability constitutes material alteration of contract under Unif.Com.C. 2-207].



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C. Formation of Contract.
4. Additional Terms in Acceptance.
b. Illustration.

4 *Witkin Sum. Cal. Law Sales* § 39

[§ 39] Illustration.

U.C.C. 2207 was given a definitive construction and application in *Steiner v. Mobil Oil Corp.* (1977) 20 C.3d 90, 141 C.R. 157, 569 P.2d 751.

Plaintiff, lessee of a Mobil service station, desired to purchase it with the assistance of defendant Mobil Oil Corp. In extended negotiations with defendant's agents, plaintiff made it clear that he needed a \$ 30,000 advance for his downpayment on the property, to be amortized through a 10-year period of gasoline purchases, and a competitive discount of 1.4 cents per gallon on such purchases for the period. Defendant's agents agreed to these terms, but lacked authority to act on them, and plaintiff's terms therefore constituted an offer to be submitted to P, the division general manager. The material on which the negotiations were based consisted of a package of standard Mobil forms with some modifications. One of them, dealing with the discount, stated that it could be changed or discontinued by Mobil at any time. Plaintiff advised defendant's agents that this was unacceptable, and they wrote him stating that if Mobil did not agree to the 1.4 cents per gallon discount as specified in his offer there would be no contract. But the agents did not transmit a copy of this letter to P, and the package of documents approved by P contained the clause permitting cancellation. This package was delivered to plaintiff without a cover letter, and the clause was not brought to his attention. After a year's operation with the discount, defendant advised plaintiff that it would be reduced to 0.5 cents per gallon, and plaintiff sued for declaratory relief and damages. The trial judge gave both. *Held*, affirmed.

(a) Under the traditional common law rule, no contract resulted if the terms of the offer and acceptance varied; the purported acceptance not in the terms of the offer was a counteroffer. This "mirror image" rule was both unfair and unrealistic in the commercial context, and was rejected by U.C.C. 2207. Under this section the parties may conclude a contract after reaching accord even though, in exchanging forms, each drafts a form to give him an advantage, or one uses forms drafted to cover the majority of its transactions in a uniform manner and does not amend it to reflect the actual deal. (20 C.3d 99.) U.C.C. 2207 inquires as to whether the parties intended to complete an agreement, and authorizes the court to determine which terms are part of the contract, either by reference to the parties' own dealings (U.C.C. 2207(1), (2)) or by reference to other provisions of the code (U.C.C. 2207(3)). (20 C.3d 99, 100.)

"Section 2207 is thus of a piece with other recent developments in contract law. Instead of fastening upon abstract doctrinal concepts like offer and acceptance, section 2207 looks to the actual dealings of the parties and gives legal

effect to that conduct. Much as adhesion contract analysis teaches us not to enforce contracts until we look behind the facade of the formalistic standardized agreement in order to determine whether any inequality of bargaining power between the parties renders contractual terms unconscionable, or causes the contract to be interpreted against the more powerful party, section 2207 instructs us not to *refuse* to enforce contracts until we look below the surface of the parties' disagreement as to contract terms and determine whether the parties undertook to close their deal. Section 2207 requires courts to put aside the formal and academic stereotypes of traditional doctrine of offer and acceptance and to analyze instead what really happens. In this spirit, we turn to the application of section 2207 in this case." (20 C.3d 100.)

(b) Applying the tests of U.C.C. 2207(1): Defendant's agents told plaintiff to go ahead with the purchase, and returned the package of documents to him without calling his attention to any of them. Thus, as the trial judge found, defendant did not make its acceptance expressly conditional on different terms; hence, a contract was formed. (20 C.3d 101.)

(c) Applying the tests of U.C.C. 2207(2): Defendant's additional term (revocability of the discount) did not become part of the agreement. (a) Plaintiff expressly limited acceptance to the terms of his offer, which included the discount for the full 10-year period. (b) Defendant's acceptance materially altered the terms of the offer. Thus, under U.C.C. 2207(2)(a), (2)(b), defendant's statement that the discount was terminable at its discretion did not become part of the contract; instead, a contract was formed incorporating the terms of plaintiff's offer. (20 C.3d 102.)

(d) U.C.C. 2204 (see *supra*, §34) does not call for a contrary conclusion. That section does not incorporate the traditional requirement of mutual assent to all essential terms. Under subdivision (3) a court, if it is to enforce a contract, must find (1) that the parties engaged in a process of offer and acceptance, rather than inconclusive negotiations, and (2) that it has sufficient information about the incomplete transaction to fill in the gaps. Both of these requirements were met here: The parties did not engage in inconclusive negotiations, and section 2207 fills in the terms. (20 C.3d 104.)

(e) The case law interpreting section 2204 supports this interpretation. Courts have held that, under U.C.C. 2204(3), parties may form a contract even though they do not agree on terms of payment, time or place for performance, quantity of goods sold, or even the price. (20 C.3d 105.)

The court, in the beginning of the opinion, observed that Mobil's justification for its conduct in seeking to impose on plaintiff the contractual term which he had expressly rejected was that "the crucial provision" of the offer "was lost in the labyrinth of the Mobil bureaucracy," so that "Mobil decisionmakers" had no opportunity to pass on it. However, U.C.C. 2207 "bars Mobil from in this way converting its own error into plaintiff's misfortune." (20 C.3d 93.) And in its conclusion the court returns to the same theme: "Mobil cannot assert as a defense the failure of its own bureaucracy to respond to, or even fully recognize, Steiner's efforts to modify the standard Mobil dealer contract." (20 C.3d 108.)

SUPPLEMENT: [This section is current through the latest supplement]



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D. Modification and Waiver.

4 Witkin Sum. Cal. Law Sales § 40

[§ 40] Modification and Waiver.

(1) *Modification*. California initially rejected the liberal modification provisions of the Official Text, and continued in former U.C.C. 2209(2) a prior rule under C.C. 1698 (see 1 *Summary* (10th), *Contracts*, §965) that a written agreement could be modified only by a written agreement or an oral agreement that has been fully executed by both parties. But the 1975 Legislature, following a recommendation of the California Law Revision Commission, amended U.C.C. 2209(2) to conform to the language of the Uniform Code, as follows:

"A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party." (See 7 *Pacific L. J.* 273.)

The agreement modifying the sales contract is binding *without consideration* (U.C.C. 2209(1)), provided that it is made in good faith (see Official Comment 2). But where the contract as modified is within the statute of frauds provision of the Code for the sale of goods, its requirements must be met. (U.C.C. 2209(3); see 2A *Anderson* 3d (1997 Rev. ed.), §2-209:85 et seq.)

(2) *Waiver*. An attempted modification that does not meet the above requirements may operate as a waiver. (U.C.C. 2209(4).) A waiver affecting an *executory* portion of the contract may be retracted, unless the other party has materially changed his or her position in reliance on the waiver, and the retraction would be "unjust." The party seeking to retract must inform the other party, by "reasonable notification received," that strict performance will be required of the waived term. (U.C.C. 2209(5).)

(3) *Effect of Course of Performance*. A repeated course of performance that has been accepted or acquiesced in without objection (see 1 *Summary* (10th), *Contracts*, §749) is relevant to show a waiver or modification of any term inconsistent with such performance. (U.C.C. 2208(3).) Construction should be in favor of a waiver whenever such construction, together with the Code provisions on retraction, is necessary "to preserve the flexible character of commercial contracts and to prevent surprise or other hardship." (U.C.C. 2208, Official Comment 3.)

West's Key Number Digest, Sales k.50, 358(2)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Modification*. See 2A Anderson 3d (2008 Rev. ed.), §2-209:87 et seq.(3) *Effect of Course of Performance*. U.C.C. 2208 was repealed in 2006. Under U.C.C. 1303(f), added in 2006, "a course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance." The rule of U.C.C. 1303(f), however, is subject to U.C.C. 2209 (text, p. 54).



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E. Delegation of Performance.

4 Witkin Sum. Cal. Law Sales § 41

[§ 41] Delegation of Performance.

(1) *Basic Rule*. Performance may be delegated unless (a) otherwise agreed, or (b) the nondelegating party has a "substantial interest in having his or her original promisor perform or control the acts required by the contract." (U.C.C. 2210(1); see 2A Anderson 3d (1997 Rev. ed.), §2-210:46 et seq.; 67 *Am.Jur.2d* (2003 ed.), Sales §354.) However, the party delegating performance is not relieved of any duty to perform himself or herself, or of any liability for breach. (U.C.C. 2210(1).) (On assignment generally, see 1 *Summary* (10th), *Contracts*, §707 et seq.)

(2) *Right to Assurances*. An assignment delegating performance may be treated by the nondelegating party as creating reasonable ground for insecurity and the nondelegating party may, without prejudicing his or her rights against the assignor, demand assurances from the assignee pursuant to U.C.C. 2609 (see *infra*, §170). (U.C.C. 2210(6).)

(3) *Construction of Prohibition Against Assignment*. A prohibition against assignment of "the contract" bars delegation of the assignor's performance. (U.C.C. 2210(4); see C.E.B., 1 UCC Sales and Leases, §11.10.)

(4) *Construction of Assignment in General Terms*. Unless the language or circumstances indicate otherwise, an assignment of "the contract," "all my rights under the contract," or a similar general assignment, is a delegation of performance of duties. Acceptance by the assignee constitutes a promise to perform that is enforceable by either the assignor or the nonassigning party. (U.C.C. 2210(5).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Basic Rule*. See 2A Anderson 3d (2008 Rev. ed.), §2-210:55 et seq.

(4) *Construction of Assignment in General Terms*. See *Quartz of Southern Calif. v. Mullen Bros.* (2007) 151 C.A.4th 901, 911, 61 C.R.3d 54 [where auto auction business sold vehicles to dealer, and dealer sold vehicles to buyers under conditional sales contracts and sold contracts to finance company without paying auction business, auction business had remedy against finance company under U.C.C. 2210(5); that statute is concerned with protecting buyers, and thus proper remedy was to order finance company, dealer's assignee, to purchase certificates of title from auction business for transfer to buyers].



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F. Assignment of Rights.

4 Witkin Sum. Cal. Law Sales § 42

[§ 42] Assignment of Rights.

(1) *Executed Rights*. Rights that are no longer executory are freely assignable even if the agreement prohibits assignment. U.C.C. 2210(2) provides that a "right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his or her entire obligation can be assigned despite agreement otherwise." (See C.E.B., 1 UCC Sales and Leases, §§11.5, 11.11; 1 *Summary* (10th), *Contracts*, §716.)

(2) *Executory Rights*. Unless otherwise agreed, and except as otherwise provided in U.C.C. 9406 (4 *Summary* (10th), *Secured Transactions in Personal Property*, §101), all executory rights of either party are assignable if the assignment does not materially (a) change the duty of the nonassigning party, (b) increase the burden or risk imposed on him or her by the contract, or (c) impair his or her chance of obtaining return performance. (U.C.C. 2210(2); see 1 *Summary* (10th), *Contracts*, §712; on Commercial Code rule that assignment cannot be prohibited, see also 4 *Summary* (10th), *Secured Transactions in Personal Property*, §159 et seq.)

U.C.C. 2210(2) is subject to U.C.C. 9406, "which makes rights to payment for goods sold ('accounts'), whether or not earned, freely alienable notwithstanding a contrary agreement or rule of law." (Official Comment 3.)

(3) *Effect of Security Interest*. "The creation, attachment, perfection, or enforcement of a security interest in the seller's interest under a contract is not a transfer that materially changes the duty of, or increases materially the burden or risk imposed on, the buyer or impairs materially the buyer's chance of obtaining return performance" within the meaning of U.C.C. 2210(2), *supra*, except to the extent that enforcement results in a delegation of material performance of the seller. "Even in that event, the creation, attachment, perfection, and enforcement of the security interest remain effective, but (A) the seller is liable to the buyer for damages caused by the delegation to the extent that the damages could not reasonably be prevented by the buyer, and (B) a court having jurisdiction may grant other appropriate relief, including cancellation of the contract for sale or an injunction against enforcement of the security interest or consummation of the enforcement." (U.C.C. 2210(3).)

(4) *Construction of Prohibition Against Assignment*. Unless the circumstances indicate otherwise, a prohibition against assignment of "the contract" does not bar assignment of rights. (U.C.C. 2210(4); see C.E.B., 1 UCC Sales and Leases, §11.10.)

(5) *Construction of Assignment in General Terms*. An assignment in general terms, such as an assignment of "the

contract," constitutes an assignment of rights. (U.C.C. 2210(5); see C.E.B., 1 UCC Sales and Leases, §11.17.)

West's Key Number Digest, Sales k.86

SUPPLEMENT: [This section is current through the latest supplement]



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A. In General.
1. General Obligations.

4 Witkin Sum. Cal. Law Sales § 43

[§ 43] General Obligations.

(1) *Basic Obligations of Delivery and Payment.* "The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract." (U.C.C. 2301.) The Code substituted the term "obligation" for the Sales Act term "duty" (see former C.C. 1761). The use of "obligation" was intended "to provide for the 'condition' aspects of delivery and payment" to the extent that they are not modified by other provisions. (U.C.C. 2301, Official Comment; see 2A Anderson 3d (1997 Rev. ed.), §2-301:34 et seq.; Cal. Civil Practice, 4 Business Litigation, §40:12 et seq.)

(2) *Requirements and Output Contracts.* Where the agreement measures the quantity of goods in terms of the buyer's requirements or the seller's output, the parties must perform in good faith. (U.C.C. 2306(1), and see Official Comment 2; 35 *U.C. Davis L. Rev.* 319 [good faith requirement of Unif.Com.C. §2-306(1)]; 94 *A.L.R.5th* 247 [requirements contracts under Unif.Com.C. §2-306(1)]; 67 *Am.Jur.2d* (2003 ed.), *Sales* §222 et seq.; on implied covenant to stay in business, see 1 *Summary* (10th), *Contracts*, §806.) Additionally, the quantity tendered or demanded must not be "unreasonably disproportionate" to the "normal or otherwise comparable prior output or requirements" or to a stated estimate. (U.C.C. 2306(1); see *Shea-Kaiser-Lockheed-Healy v. Department of Water & Power* (1977) 73 *C.A.3d* 679, 686, 687, 688, footnote 4, 140 *C.R.* 884 [applying U.C.C. 2306(1) in accordance with Official Comment].)

(3) *Exclusive Dealings Contracts.* Parties to exclusive dealings contracts (see 1 *Summary* (10th), *Contracts*, §589) are required to act with reasonable diligence as well as good faith. (U.C.C. 2306(2), and see Official Comment 5.) Unless otherwise agreed, an exclusive dealings contract imposes an obligation on the seller to use his or her "best efforts" to supply the goods and an obligation on the buyer to use his or her "best efforts" to promote their sale. (U.C.C. 2306(2); see 67 *Am.Jur.2d* (2003 ed.), *Sales* §226 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Basic Obligations of Delivery and Payment.* See 2A Anderson 3d (2008 Rev. ed.), §2-301:35 et seq.



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A. In General.
2. Allocation of Risks and Burdens.

4 Witkin Sum. Cal. Law Sales § 44

[§ 44] Allocation of Risks and Burdens.

Some Commercial Code provisions place a risk or burden upon a particular party but expressly authorize modification of this allocation. (See, e.g., U.C.C. 2509, *infra*, §152, allocating risk of loss.) In such circumstances, U.C.C. 2303 permits the parties to agree either to shift the burden or risk entirely to the other party or to divide it between them. (See 2A Anderson 3d (1997 Rev. ed.), §2-303:4 *et seq.*)

SUPPLEMENT: [This section is current through the latest supplement]
See 2A Anderson 3d (2008 Rev. ed.), §2-303:4 *et seq.*



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A. In General.

3. Certainty: Details and Cooperation.

4 Witkin Sum. Cal. Law Sales § 45

[§ 45] Certainty: Details and Cooperation.

Within the framework of general obligations established by U.C.C. 2301, the Code allows the parties to a sales agreement wide latitude to establish details of performance subsequent to formation of the contract. So long as the agreement is sufficiently definite under the criteria established by U.C.C. 2204(3) (see *supra*, §34), it is not made invalid by the fact that it leaves "particulars of performance to be specified by one of the parties." (U.C.C. 2311(1).)

Section 2311 provides rules for the specification of certain open terms in a sales agreement. (See U.C.C. 2311(1), (2); 1 *Summary* (10th), *Contracts*, §146 et seq.) And the section provides a special remedy, "in addition to all other remedies," where either a specification materially affecting performance is not seasonably made or cooperation necessary to the agreed performance is not seasonably forthcoming. The party requiring the specification or performance is excused from any resulting delay in his or her own performance, and may "either proceed to perform in any reasonable manner" or, after the time for a material part of his or her own performance, "treat the failure to specify or to co-operate as a breach by failure to deliver or accept the goods." (U.C.C. 2311(3), and see Official Comments 3, 4; C.E.B., 1 UCC Sales and Leases, §4.91.)

West's Key Number Digest, Sales k.1(4)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Price.
1. Medium of Payment.

4 *Witkin Sum. Cal. Law Sales* § 46

[§ 46] Medium of Payment.

(1) *In General*. The purchase price "can be made payable in money or otherwise." (U.C.C. 2304(1).) Thus, in *H. S. Crocker Co. v. McFaddin* (1957) 148 C.A.2d 639, 307 P.2d 429, decided under the former Sales Act provision, plaintiff, a distributor of Christmas cards, sent a large quantity of past seasons' cards to C dump company for *destruction*. Plaintiff's employee failed to state this purpose, and C, after charging the smaller fee for *dumping and salvage*, sold the cards to defendant. Plaintiff contended that defendant gained no title because the original transaction with C was a bailment for destruction. *Held*, despite the secret intention of plaintiff, the transaction, judged by its outward manifestations (objective test of contract), was a sale; the price paid by the buyer C was the *privilege* of dumping the cards. (148 C.A.2d 646.) (See also *Wilson v. Superior Court* (1935) 2 C.2d 632, 636, 43 P.2d 286.)

(2) *Realty*. The Code changes the law on payment for goods by the transfer of an interest in realty. Former C.C. 1729(3) excluded from the scope of the Sales Act transactions involving the transfer of real property. The Commercial Code is expressly made applicable, but to a limited extent, to transactions in which goods are exchanged for realty. In such a transaction, the person transferring the goods incurs the obligations of a seller under the Code, but neither the transfer of the interest in realty nor the transferor's obligations in connection with the realty are subject to the Code. (U.C.C. 2304(2).)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Price.
2. Open Price Term.

4 Witkin Sum. Cal. Law Sales § 47

[§ 47] Open Price Term.

(1) *Intent To Conclude the Contract.* "The parties if they so intend can conclude a contract for sale even though the price is not settled." (U.C.C. 2305(1); see 91 *A.L.R.3d* 1237 [construction and application of Unif.Com.C. §2-305]; 67 *Am.Jur.2d* (2003 ed.), Sales §274 et seq.) The Code rejects the general contract principle that an agreement to agree on an essential term in the future is fatally uncertain and unenforceable (see 1 *Summary* (10th), *Contracts*, §147) where the term to be fixed is the price. (See U.C.C. 2305, Official Comment 1; cf. *California Lettuce Growers v. Union Sugar Co.* (1955) 45 *C.2d* 474, 482, 289 *P.2d* 785 [agreement valid under former Sales Act where price could be objectively determined].)

Where, however, the parties intend not to be bound unless the open price term is fixed or agreed upon, there is no contract if the price is not set. The buyer must return any goods already received or, if unable to do so, pay their reasonable value at the time of delivery. Any portion of the price paid on account must be returned by the seller. (U.C.C. 2305(4), and see Official Comments 2, 4.)

(2) *Methods of Fixing Price.* The Code refers to fixing of the price by the seller or the buyer (U.C.C. 2305(2)), by agreement of the parties (U.C.C. 2305(1)(b)) or "in terms of some agreed market or other standard as set or recorded by a third person or agency" (U.C.C. 2305(1)(c)). (See *Great Western Distillery Products v. John A. Wathen Distillery Co.* (1937) 10 *C.2d* 442, 450, 74 *P.2d* 745 [price of sales under exclusive agency contract was controlled by existing market conditions at the several times of sale]; C.E.B., 1 UCC Sales and Leases, §§3.20, 4.3 et seq.; 49 *A.L.R.2d* 508 [fixed by buyer]; 63 *A.L.R.2d* 1337 ["escalator clause" varying price in proportion to variations in some external standard].)

(3) *Good Faith in Fixing Price.* Where the price is left to be fixed by the buyer or the seller, that party is under an obligation of good faith. (U.C.C. 2305(2).)

(4) *Reasonable Price Where None Is Fixed.* If the parties intended to conclude a binding agreement even though the price was left open, the price is "a reasonable price at the time for delivery" in the following situations: (a) The contract is silent as to the price term; (b) the parties agreed to agree on the price and they fail to do so; or (c) the price is to be fixed by a third party or agency or on the basis of an agreed market or other standard and it is not so fixed. (U.C.C. 2305(1); see 2A *Anderson* 3d (1997 Rev. ed.), §2-305:31 et seq.; C.E.B., 1 UCC Sales and Leases, §4.5 et seq.) The last provision changes the law. Under the Sales Act, if the third person could not or did not fix the price, the contract was

avoided. (See former C.C. 1730.)

(5) *Wrongful Interference by Party*. Where the price is to be fixed by a means other than by agreement of the parties and it is not so fixed due to the fault of one party, the other party has the option of either treating the contract as cancelled or setting a reasonable price himself or herself. (U.C.C. 2305(3); see C.E.B., 1 UCC Sales and Leases, §4.13 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Reasonable Price Where None Is Fixed*. See 2A Anderson 3d (2008 Rev. ed.), §2-305:33 et seq.



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Witkin Summary of California Law IV. GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT C. Place and Time of Performance. 1. Place of Delivery.

4 Witkin Sum. Cal. Law Sales § 48

[§ 48] Place of Delivery.

(1) *Goods*. The Commercial Code continues without change the former Sales Act provisions designating the place of delivery. Unless otherwise agreed, (a) the place of delivery is the *seller's place of business*, or, if he or she has none, *the seller's residence* (U.C.C. 2308(a)); or, (b) if the contract is for the sale of identified goods and the parties know at the time of contracting that the goods are in *some other place*, that is the place of delivery (U.C.C. 2308(b)). (Cf. former C.C. 1763; *Robbins v. Pacific Eastern Corp.* (1937) 8 C.2d 241, 270, 65 P.2d 42 [exchange of certificates of stock; unless otherwise agreed personal property is deliverable at place where it is located at time of sale]; *Fischer v. Means* (1948) 88 C.A.2d 137, 142, 198 P.2d 389 [contract specified seller's place of business].) These rules are inapplicable where the agreement requires or authorizes the seller to ship the goods by carrier (see U.C.C. 2308, Official Comment 1); the seller's duties as to delivery in that case are determined by U.C.C. 2504 (see *infra*, §144).

Where the goods are in the possession of a bailee and delivery of the goods themselves rather than transmission of documents of title is intended, the seller must procure the bailee's acknowledgment of the buyer's right to possession. (U.C.C. 2308, Official Comment 2.)

(2) *Documents of Title*. The Code contains a new provision for "delivery" by means of transmission of documents of title. Unless otherwise agreed, such documents may be delivered "through customary banking channels." (U.C.C. 2308(c), and see Official Comment 3; 2A Anderson 3d (1997 Rev. ed.), §§2-308:12, 2-308:13.)

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SUPPLEMENT: [This section is current through the latest supplement]

(2) *Documents of Title*. See 2A Anderson 3d (2008 Rev. ed.), §§2-308:15, 2-308:16.



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CHAPTER V - Sales

Witkin Summary of California Law
IV. GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT
C. Place and Time of Performance.
2. Time of Delivery.

4 Witkin Sum. Cal. Law Sales § 49

[§ 49] Time of Delivery.

Delivery must be made within a reasonable time if the time for delivery is not agreed upon or otherwise established by the Code. (U.C.C. 2309(1); cf. former C.C. 1763(2); see *Trubowitch v. Riverbank Canning Co. (1947) 30 C.2d 335, 341, 182 P.2d 182*; *Kuhn v. Valley Meat Co. (1937) 23 C.A.2d 25, 31, 72 P.2d 164*; C.E.B., 1 UCC Sales and Leases, §4.62 et seq.; 67 *Am.Jur.2d (2003 ed.)*, Sales §264 et seq.)

West's Key Number Digest, Sales k.81(1)

SUPPLEMENT: [This section is current through the latest supplement]



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Witkin Summary of California Law
IV. GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT
C. Place and Time of Performance.
3. Time of Payment.

4 *Witkin Sum. Cal. Law Sales* § 50

[§ 50] Time of Payment.

The parties to a sales contract are free to negotiate and establish the time of payment for goods. (See U.C.C. 2310; 67 *Am.Jur.2d* (2003 ed.), *Sales* §281 et seq.) In the absence of such an agreement several rules apply, which generally "reflect modern business methods of dealing at a distance rather than face to face." (See U.C.C. 2310, Official Comment.)

(1) *On Receipt of Goods.* Payment is due "at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery." (U.C.C. 2310(a).) Thus, payment is due on receipt of the goods, not on delivery, as under the former Sales Act. (See former C.C. 1762.) These places may differ, as in the case of a shipment contract (see *infra*, §§117, 118). (See 2A Anderson 3d (1997 Rev. ed.), §§2-310:6, 2-310-7; C.E.B., 1 UCC Sales and Leases, §4.71.)

(2) *Shipment Under Reservation.* Where the seller ships the goods under reservation (see U.C.C. 2505, *infra*, §145) and tenders documents of title, payment is due at the place of receipt of the goods, but not until the buyer has inspected them, unless inspection is inconsistent with the terms of the contract. (U.C.C. 2310(b); for buyer's right of inspection generally, see *infra*, §§149, 150.) The seller can retain possession of the goods until payment has been received. (See U.C.C. 2310, Official Comment 2.)

(3) *Delivery by Documents of Title.* Where delivery is to be made by means of documents of title, payment is due at the time and place the documents are to be received by the buyer, whether or not this is the place of receipt of the goods, unless the seller tenders the documents in accordance with U.C.C. 2310(b), *supra*. (U.C.C. 2310(c); see 2A Anderson 3d (1997 Rev. ed.), §2-310:14; C.E.B., 1 UCC Sales and Leases, §4.72.)

(4) *Sale on Credit.* Where the agreement requires or authorizes the seller to ship the goods on credit but does not indicate when the credit period is to commence, the credit period runs from the time of shipment. If the invoice is postdated or its dispatch is delayed, commencement of the credit period will be correspondingly delayed. (U.C.C. 2310(d), and see Official Comment 5.)

(5) *Delivery in Several Lots.* Where the agreement and the circumstances allow delivery to be made in several lots, and the price is apportionable, the seller may demand that the price be apportioned and payment made upon receipt of

each lot. (U.C.C. 2307; see 2A Anderson 3d (1997 Rev. ed.), §2-307:12.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *On Receipt of Goods*. See 2A Anderson 3d (2008 Rev. ed.), §2-310:6 et seq.

(3) *Delivery by Documents of Title*. U.C.C. 2310(c) was extensively amended in 2006. Under the amended subdivision, if delivery is authorized and made by way of documents of title other than as authorized in U.C.C. 2310(b) (text, p. 61), then payment is due, "regardless of where the goods are to be received," at the time and place at which the buyer is to receive delivery of the tangible documents, or at the time the buyer is to receive delivery of the electronic documents and at the seller's place of business (or, if none, the seller's residence).

See 2A Anderson 3d (2008 Rev. ed.), §2-310:15.(5) *Delivery in Several Lots*. See 2A Anderson 3d (2008 Rev. ed.), §2-307:12 et seq.



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CHAPTER V - Sales

Witkin Summary of California Law
IV. GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT

D. Warranties.

1. In General.

a. Nature and Effect.

4 Witkin Sum. Cal. Law Sales § 51

[§ 51] Nature and Effect.

A warranty is a contractual term concerning some aspect of the sale, such as title to the goods, or their quality or quantity. (See *Windham at Carmel Mountain Ranch Assn. v. Superior Court* (2003) 109 C.A.4th 1162, 1168, 135 C.R.2d 834, quoting the text.) The warranty may be express (see *infra*, §56 et seq.) or implied (see *infra*, §67 et seq.). Official Comment 1 of U.C.C. 2313 suggests this distinction: Express warranties are "dickered" aspects of the negotiations that led to the sale; implied warranties arise not from the negotiations but from a common factual situation or set of conditions. (See 2 Williston on Sales (5th), §15-1 et seq.; Cal. Civil Practice, 5 Business Litigation, §53:1 et seq.; Cal. Transactions Forms, 4 Business Transactions §24:201 et seq.; on breach of statutory standards, express warranty, or enhanced protection agreement as basis for construction defects action against homebuilder or subcontractor, see C.C. 896 et seq., 6 *Summary* (9th), *Torts*, §1162 et seq.)

Warranties may be modified or excluded under certain circumstances by usage (*infra*, §79), examination of goods by the buyer (*infra*, §80), inconsistency of express and implied warranties (*infra*, §§95, 96), or disclaimer (*infra*, §82 et seq.).

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SUPPLEMENT: [This section is current through the latest supplement]



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D. Warranties.
1. In General.
b. Commercial Code, Consumer Warranty Act, and Federal Warranty Law.

4 Witkin Sum. Cal. Law Sales § 52

[§ 52] Commercial Code, Consumer Warranty Act, and Federal Warranty Law.

(1) *Uniform Commercial Code*. U.C.C. 2312 through 2317 replace the warranty provisions of the Sales Act and provide the basic statutory authority for sales warranties. (Cf. former C.C. 1732 et seq.; for a general comparison of the former Sales Act with the Uniform Commercial Code, see *8 U.C.L.A. L. Rev. 281*; 2A Anderson 3d (1997 Rev. ed.), §2-312:1 et seq.; 3 Anderson 3d (2002 Rev. ed.), §§2-313:1 et seq., 2-314:1 et seq.; 3A Anderson 3d (2002 Rev. ed.), §§2-315:1 et seq., 2-316:1 et seq., 2-317:1 et seq.; *17 A.L.R.3d 1067*.)

(2) *Consumer Warranty Act*. The Song-Beverly Consumer Warranty Act (see C.C. 1790 et seq.; *infra*, §314) establishes broad statutory control over warranties in consumer sales. To the extent that the Act gives rights to the buyers of consumer goods, it prevails over conflicting provisions of the Uniform Commercial Code. (C.C. 1790.3; see U.C.C. 2102 [division on sales does not impair or repeal statutes regulating consumer sales]; on the Act generally, see *4 Pacific L. J. 183*; *26 U.C.L.A. L. Rev. 583* [California consumer warranty law under Commercial Code, Song-Beverly Act, and Magnuson-Moss Act].)

The Act defines "consumer goods" as "any new product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and consumables." (C.C. 1791(a).) Included are "new and used assistive devices sold at retail." (C.C. 1791(a).) An "assistive device" is defined as any instrument, apparatus, or contrivance used to assist a physically disabled person in treating or mitigating his or her injury or disease, or to assist, affect, or replace a body function or structure. (C.C. 1791(s) [excluding prescriptive lenses and ophthalmic goods unless sold or dispensed to a blind person; a prior version of C.C. 1791 will become operative on January 1, 2008, under which the lettering of C.C. 1791(s) will revert to C.C. 1791(p)].) The Act also defines "clothing" (C.C. 1791(c)) and "consumables" (C.C. 1791(d)), and includes these items within the scope of coverage. Also included are mechanical, electrical, or thermal components of heating, cooling, or air conditioning systems. (C.C. 1795.1 [excluding the system as a whole when it is a fixture].) (See *Atkinson v. Elk Corp. (2003) 109 C.A.4th 739, 757, 135 C.R.2d 433* [roof shingles are not consumer goods within meaning of Act].)

(3) *Federal Warranty Law*. The Magnuson-Moss Warranty Act (*15 U.S.C.*, §2301 et seq.; see *infra*, §327) regulates written warranties on consumer products and establishes new consumer remedies. The Act applies to the distribution of consumer goods in interstate commerce (see definitions, *15 U.S.C.*, §2301) but does not restrict consumer rights or

remedies under state law and does not affect liability for personal injury (15 U.S.C., §2311(b)). (See 32 *Hastings L. J.* 341 [Innovation in the Law of Warranty: The Burden of Reform]; 31 *Stanf. L. Rev.* 1117 [empirical study]; 26 *U.C.L.A. L. Rev.* 583 [California consumer warranty law under Consumer Code, Song-Beverly Act, and Magnuson-Moss Act].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Uniform Commercial Code*. See 2A Anderson 3d (2008 Rev. ed.), §2-312:1 et seq.

(3) *Federal Warranty Law*. See *Atkinson v. Elk Corp. of Texas* (2006) 142 C.A.4th 212, 226, 48 C.R.3d 247 [roof shingles were consumer products under Magnuson-Moss Warranty Act, even though they were intended to be incorporated into realty, where they were purchased at homeowner's behest by contractor for installation on homeowner's existing dwelling]; *Daugherty v. American Honda Motor Co.* (2006) 144 C.A.4th 824, 833, 51 C.R.3d 118 [in action against automobile manufacturer, trial judge correctly concluded that plaintiffs' failure to state express warranty claim under state law necessarily constituted failure to state claim under Magnuson-Moss Warranty Act; Act calls for application of state written and implied warranty law, not creation of additional federal law, except in specific instances in which it expressly prescribes regulating rule].



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D. Warranties.
1. In General.
c. Necessity of Sale.

4 Witkin Sum. Cal. Law Sales § 53

[§ 53] Necessity of Sale.

(1) *In General*. In some situations what appears to be a good case of breach of warranty may fail because the transaction is not considered a *sale*. (See *Shepard v. Alexian Bros. Hosp.* (1973) 33 C.A.3d 606, 614, 109 C.R. 132, *infra*, §106 [under statutory law sale is an essential element to impose liability under warranties]; 48 A.L.R.3d 668 [application of Code warranties to bailments].)

(2) *Service of Food*. Prior to adoption of the Uniform Commercial Code many jurisdictions refused to regard *service* of food in a restaurant as a sale. California held that restaurant service was a sale of food, and U.C.C. 2314(1) codifies this rule. (See *infra*, §104.)

(3) *Furnishing Blood*. The furnishing of blood and blood derivatives is, by legislative declaration, a service and not a sale, and is therefore free from implied warranties. (See *infra*, §106.)

(4) *Contract for Labor and Materials*. Although a contract to furnish labor and materials is not a sale, and is therefore not governed by the Uniform Commercial Code warranties, similar warranties may be applied in a proper case; e.g., the warranty of merchantability or suitability for ordinary use. In *Aced v. Hobbs-Sesack Plumbing Co.* (1961) 55 C.2d 573, 583, 12 C.R. 257, 360 P.2d 897, decided under the Sales Act, the court said: "There is no justification for refusing to imply a warranty of suitability for ordinary uses merely because an article is furnished in connection with a construction contract rather than one of sale." (See also *Kuitens v. Covell* (1951) 104 C.A.2d 482, 484, 485, 231 P.2d 552 [implied warranty that roof covering would be fit for its intended use]; *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Cavanaugh* (1963) 217 C.A.2d 492, 504, 32 C.R. 144, *infra*, §99; 1 Cal. Western L. Rev. 123.)

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SUPPLEMENT: [This section is current through the latest supplement]



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D. Warranties.

1. In General.

d. Transfer of Document of Title.

4 *Witkin Sum. Cal. Law Sales* § 54

[§ 54] Transfer of Document of Title.

(1) *Warranties as to Documents.* A collecting bank or other *intermediary* that is known to be delivering documents on behalf of another warrants only its good faith and authority. (U.C.C. 7508.) But where the document of title is negotiated or transferred for value and the transferor is not acting merely as an intermediary, the transferor warrants to his or her immediate purchaser, unless otherwise agreed: (a) genuineness; (b) his or her right to transfer the documents; and (c) lack of knowledge of defects. (U.C.C. 7507; see 7A Anderson 3d (1995 Rev. ed.), §7-507:4 et seq.; *infra*, §139.)

(2) *Warranties as to Goods.* Under the former Sales Act, the transferor of a document of title also warranted certain things as to the *goods* represented by the document. Although U.C.C. 7507 recognizes that the implied warranties of title are "in addition to any warranty made in selling the goods," the Code omitted these Sales Act warranties as "unnecessary and incomplete." Warranties as to the goods derive from the sales contract and not from the transfer of documents. (See U.C.C. 7507, Official Comment 1.)

SUPPLEMENT: [This section is current through the latest supplement]



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D. Warranties.
1. In General.
e. Fraudulent Representation Distinguished.

4 *Witkin Sum. Cal. Law Sales* § 55

[§ 55] Fraudulent Representation Distinguished.

There are several distinctions between warranties and fraudulent representations that induce a sale. (See *infra*, this section.) But U.C.C. 2721 reduces their importance by extending to a defrauded buyer the same remedies that the buyer might have asserted for breach of warranty, contrary to the limited "out of pocket" loss rule normally applied in fraud actions. (See *infra*, §178.)

(1) *Scienter*. An essential element of actionable misrepresentation is scienter or knowledge of its falsity, or negligence in making it without reasonable ground for believing it to be true. (See 5 *Summary* (10th), *Torts*, §800 et seq.) No conscious misstatement is required in the case of a warranty; it may be the ground for an action although made in good faith. (See *Mary Pickford Co. v. Bayly Bros.* (1939) 12 C.2d 501, 520, 86 P.2d 102 ["The obligation of a warranty is absolute, and is imposed as a matter of law irrespective of whether the seller knew or should have known of the falsity of his representations"]; *Rutherford v. Standard Engineering Corp.* (1948) 88 C.A.2d 554, 565, 199 P.2d 354; *Tremeroli v. Austin Trailer Equipment Co.* (1951) 102 C.A.2d 464, 475, 227 P.2d 923 [absolute liability, not based on negligence]; *Grinnell v. Charles Pfizer & Co.* (1969) 274 C.A.2d 424, 442, 79 C.R. 369.)

(2) *Intent*. An intent to defraud is an element of fraudulent representation. (See 5 *Summary* (10th), *Torts*, §802 et seq.) A warranty arises, however, without regard to the seller's intent. (See U.C.C. 2313(2); *Hayman v. Shoemaker* (1962) 203 C.A.2d 140, 152, 21 C.R. 519.)

(3) *Admissibility of Parol Evidence*. A warranty is a term of the sales contract. Thus, where the buyer offers extrinsic evidence of an express warranty or the seller offers extrinsic evidence of the exclusion or modification of a warranty, the requirements of the parol evidence rule must be satisfied. (See U.C.C. 2202; 2 *Cal. Evidence* (4th), *Documentary Evidence*, §59 et seq.) A fraudulent representation is not a term of the contract but an antecedent statement made as an inducement to enter into it. So, where a contract contains a stipulation that no representations were made adding to or modifying its *terms*, this will not bar evidence of false representations. (See *Ferguson v. Koch* (1928) 204 C. 342, 346, 268 P. 342; *J.B. Colt Co. v. Freitas* (1926) 76 C.A. 278, 284, 244 P. 916; *Ron Greenspan Volkswagen v. Ford Motor Land Dev. Corp.* (1995) 32 C.A.4th 985, 995, 38 C.R.2d 783; on effect of clauses disclaiming warranties, see *infra*, §82 et seq.)

(4) *Nature of Cause of Action.* The warranty is contractual, and breach gives rise to an action ordinarily subject to venue, limitations, and attachment rules applicable to contract actions, while a misrepresentation gives rise to a tort action. (For the tort-contract distinction, see 3 *Cal. Proc.* (4th), *Actions*, §134 et seq.; see, however, on the hybrid contract-tort aspect of warranty, 43 *Cal. L. Rev.* 546; 7 *Hastings L. J.* 217.)

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SUPPLEMENT: [This section is current through the latest supplement]

(4) *Nature of Cause of Action.*

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §139 et seq.



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D. Warranties.

2. Express Warranties.

a. Promissory Language.

4 *Witkin Sum. Cal. Law Sales* § 56

[§ 56] Promissory Language.

(1) "*Warrant*" or "*Guarantee*." The simplest and oldest form of express warranty is the promissory warranty, by which the seller expressly "warrants" or "guarantees" that certain things are true, or that the seller will be answerable for certain matters relating to the goods. (See *Stott v. Johnston* (1951) 36 C.2d 864, 866, 229 P.2d 348 ["We would reimburse you a hundred percent for labor and materials for any paint that goes bad"]; *India Paint & Lacquer Co. v. United Steel Products Corp.* (1954) 123 C.A.2d 597, 605, 267 P.2d 408 [oral representations that paint manufacturer, in substituting new formula paint for earlier satisfactory paint, "would absolutely guarantee" satisfactory performance]; *Rose v. Chrysler Motors Corp.* (1963) 212 C.A.2d 755, 758, 28 C.R. 185, *infra*, §205 ["We, your selling dealer, warrant each new motor vehicle sold by us to be free from defects in material and workmanship"]; *Ghera v. Ford Motor Co.* (1966) 246 C.A.2d 639, 651, 55 C.R. 94; Cal. Civil Practice, 5 Business Litigation, §53.10 *et seq.*; 23 So. Cal. L. Rev. 287; 8 U.C.L.A. L. Rev. 284; 99 A.L.R.2d 1419 [construction and effect of standard new automobile warranty].)

(2) *Any Promise Relating to the Goods*. The Commercial Code does not require formal words, such as "warrant" or "guarantee," to create an express warranty. (U.C.C. 2313(2).) "Any ... promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the ... promise." (U.C.C. 2313(1)(a); see *Hauter v. Zogarts* (1975) 14 C.3d 104, 115, footnote 10, 120 C.R. 681, 534 P.2d 377, *infra*, §71 [observing that U.C.C. 2313 expands sellers' liability beyond former Sales Act and provides greater coverage than *Rest.2d, Torts* §402B]; 74 A.L.R.3d 1298 [on statement in *Hauter v. Zogarts, supra*, that toy is safe as affecting manufacturer's liability for injury]; 19 Santa Clara L. Rev. 447 [meaning of "part of the basis of the bargain"]; 11 U.C. Davis L. Rev. 335 [express warranties in seed sales]; 3 Anderson 3d (2002 Rev. ed.), §2-313:44 *et seq.*; BAJI, No. 9.50; CACI, No. 1230; Clark & Smith, *The Law of Product Warranties*, Chap. 4.) (On whether representations made after sale is closed may form basis of express warranty, see 47 A.L.R.4th 200.)

(3) *Undertaking To Preserve or Maintain Consumer Goods*. The Consumer Warranty Act similarly does not require formal words. (See C.C. 1791.2(b); cf. C.C. 1793.02(a), which requires, with certain exceptions (see C.C. 1793.02(e)), all new and used assistive devices (see *supra*, §52) sold at retail to be accompanied by a seller's written warranty containing specified language warranting fitness for the buyer's particular needs.) An express warranty within the provisions of the Act is created by a "written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance

of the consumer good or provide compensation if there is a failure in utility or performance." (C.C. 1791.2(a)(1); see 4 *Pacific L. J.* 185.)

(4) *Promise of Performance or Repair.* The federal Magnuson-Moss Warranty Act (see *supra*, §52 and *infra*, §327) gives alternative definitions of a "written warranty" in a consumer sale: (a) any "written affirmation of fact or written promise" that the "material or workmanship is defect free or will meet a specified level of performance over a specified period of time" (15 U.S.C., §2301(6)(A)), or (b) any written undertaking "to refund, repair, replace, or take other remedial action" with respect to the consumer product being sold if it "fails to meet the specifications set forth in the undertaking" (15 U.S.C., §2301(6)(B)).

SUPPLEMENT: [This section is current through the latest supplement]



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D. Warranties.

2. Express Warranties.

b. Representations.

1. Affirmation of Fact.

4 Witkin Sum. Cal. Law Sales § 57

[§ 57] Affirmation of Fact.

(1) *In General.* The usual warranty occurs by reason of the seller's representations. No particular words are necessary, and it is not essential that the seller intend that the statement shall have this effect. (U.C.C. 2313(2).) "Any affirmation of fact ... made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation." (U.C.C. 2313(1)(a); see 7 *So. Cal. L. Rev.* 96; 8 *U.C.L.A. L. Rev.* 284; 67 *A.L.R.2d* 619 [whether oral statements amount to warranty as question of law or fact]; 36 *A.L.R.3d* 164 [representations about used automobiles]; 94 *A.L.R.3d* 729 [what constitutes "affirmation of fact" giving rise to express warranty under Unif.Com.C. §2-313(1)(a)]; 2 *American Law of Products Liability* 3d, §19:11 et seq.; *BAJI*, No. 9.50; 67A *Am.Jur.2d* (2003 ed.), *Sales* §663 et seq.)

(2) *Illustrations.* Pre-Code cases determining whether particular words constituted an affirmation of fact amounting to a warranty were numerous. (See *Lewin v. Pioneer Hatchery* (1929) 99 *C.A.* 473, 477, 278 *P.* 902 [assurance by defendant that cockerels purchased for breeding purposes were in "good, healthy and virile condition" held a warranty]; *Chamberlain Co. v. Allis-Chalmers Mfg. Co.* (1942) 51 *C.A.2d* 520, 523, 125 *P.2d* 113 [contract of sale of sifting machine "to be used to grade two tons per hour of Dry Pumice through the following screen meshes at 98 1/2 per cent efficiency," held warranty of capacity and efficiency]; *Reininger v. Eldon Mfg. Co.* (1952) 114 *C.A.2d* 240, 241, 250 *P.2d* 4 [representation that dies would be made according to drawings furnished by buyer]; *Basin Oil Co. of Calif. v. Baash-Ross Tool Co.* (1954) 125 *C.A.2d* 578, 593, 271 *P.2d* 122 [representation that seller would make article as good as the one buyer was using]; *Roberts Distr. Co. v. Kaye-Halbert Corp.* (1954) 126 *C.A.2d* 664, 669, 272 *P.2d* 886 [sale of television sets "in their original cartons"; held an express warranty that they were new sets as originally packed by manufacturer and in marketable condition]; *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Cavanaugh* (1963) 217 *C.A.2d* 492, 504, 32 *C.R.* 144, *infra*, §99; *Grinnell v. Charles Pfizer & Co.* (1969) 274 *C.A.2d* 424, 439, 440, 79 *C.R.* 369 [drug manufacturer's package insert that "There are no known contraindications to oral polio virus vaccines"; decided under former C.C. 1732].)

U.C.C. 2313 was given a definitive construction in *Keith v. Buchanan* (1985) 173 *C.A.3d* 13, 220 *C.R.* 392.

Plaintiff buyer, with experience in sailing yachts, obtained advertising literature from defendant seller which

described the yacht in question as "a carefully well-equipped, and very seaworthy live-aboard vessel." Plaintiff also asked an experienced friend to inspect it and was advised that it would suit his needs. After the sale a dispute arose as to its seaworthiness, and plaintiff sued for breach of express warranty and implied warranty of fitness. The trial judge granted defendant's motion for judgment on the ground that the sales brochures contained opinions, and that plaintiff did not rely on defendant seller's skill and judgment. *Held*, reversed as to express warranty.

(a) *Affirmation of fact*. "Recent decisions have evidenced a trend toward narrowing the scope of representations which are considered opinion, sometimes referred to as 'puffing' or 'sales talk,' resulting in an expansion of the liability that flows from broad statements of manufacturers or retailers as to the quality of their products. Courts have liberally construed affirmations of quality made by sellers in favor of injured consumers. ... It has even been suggested 'that in an age of consumerism all seller's statements, except the most blatant sales pitch, may give rise to an express warranty.' " (173 C.A.3d 21.) Hence, statements made by a seller "are presumptively affirmations of fact unless it can be demonstrated that the buyer could only have reasonably considered the statement as a statement of the seller's opinion." (173 C.A.3d 21.)

(b) *Opinion distinguished*. "Commentators have noted several factors which tend to indicate an opinion statement. These are (1) a lack of specificity in the statement made, (2) a statement that is made in an equivocal manner, or (3) a statement which reveals that the goods are experimental in nature." (173 C.A.3d 21.) The sales brochures contained statements that were specific and unequivocal, and did not indicate that the vessel was experimental in nature; hence, the representations of seaworthiness were affirmations of fact. (173 C.A.3d 22.)

(c) *Part of the basis of the bargain*. The effect of this phrase in U.C.C. 2313 has been the subject of some uncertainty in California. (See *infra*, §59.) However, the shift in language (from the old requirement of reliance) "clearly changes the degree to which it must be shown that the seller's representation affected the buyer's decision to enter into the agreement. A buyer need not show that he would not have entered into the agreement absent the warranty or even that it was a dominant factor inducing the agreement. A warranty statement is deemed to be part of the basis of the bargain and to have been relied upon as one of the inducements for the purchase of the product." (173 C.A.3d 23.) Thus, "[i]t is clear from the new language of this code section that the concept of reliance has been purposefully abandoned." (173 C.A.3d 23.)

(d) *Burden of proof on seller*. The burden is on the seller to prove that the bargain does not rest at all on the representations; and, though the buyer's actual knowledge of the true condition of the goods may make it plain that the statement was not relied on, the seller must demonstrate such knowledge. (173 C.A.3d 23.)

(e) *Inspection of goods by buyer*. "Where the buyer inspects the goods before purchase, he may be deemed to have waived the seller's express warranties. But, an examination or inspection by the buyer of the goods does not necessarily discharge the seller from an express warranty if the defect was not actually discovered and waived." (173 C.A.3d 24.) Here, plaintiff and his experienced advisers observed the boat, but there was no testing of the vessel in the water. The warranty of seaworthiness necessarily relates to the time when the vessel has been put to sea and has been shown to be reasonably fit for its intended purposes. The inspection here "was limited and would not have indicated whether or not the vessel was seaworthy." (173 C.A.3d 24.)

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SUPPLEMENT: [This section is current through the latest supplement]



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D. Warranties.

2. Express Warranties.

b. Representations.

2. Distinction: Value or Opinion.

4 *Witkin Sum. Cal. Law Sales* § 58

[§ 58] Distinction: Value or Opinion.

The Commercial Code states that "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty." (U.C.C. 2313(2); cf. former C.C. 1732 [similar]; see 3 Anderson 3d (2002 Rev. ed.), §2-313:128 et seq.; CACI, No. 1230 [warranty not created by statement of value, opinion, or recommendation]; BAJI, No. 9.51; and see discussion in *Keith v. Buchanan* (1985) 173 C.A.3d 13, 21, 22, 220 C.R. 392, supra, §57.)

The Consumer Warranty Act similarly excludes affirmations of value and opinions or commendations. (See C.C. 1791.2(b).) The Act also excludes "[s]tatements or representations such as expressions of general policy concerning customer satisfaction which are not subject to any limitation." (C.C. 1791.2(c).)

In *Williams v. Lowenthal* (1932) 124 C.A. 179, 183, 184, 12 P.2d 75, assurances that a musical instrument was a "good machine and would probably not require repair," and was "in good workable condition" were held matters of opinion. (See also *Steen v. Southern Calif. Supply Co.* (1925) 74 C.A. 265, 266, 239 P. 1098; *Perry v. Magee* (1953) 116 C.A.2d 155, 159, 253 P.2d 488.) (Cf. *Keith v. Buchanan*, supra [statements in brochure regarding vessel's seaworthiness constituted statements of fact].)

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2. Express Warranties.

b. Representations.

3. Buyer's Reliance Not Required.

4 *Witkin Sum. Cal. Law Sales* § 59

[§ 59] Buyer's Reliance Not Required.

(1) *Former Law*. Under the Sales Act, the buyer must have relied upon the seller's statement. An affirmation of fact or a promise could constitute an express warranty only if "the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon." (Former C.C. 1732.)

(2) *Commercial Code*. The Code requires substantially less of a connection between the representation and sale; the warranty is founded on an affirmation of fact or promise which "relates to the goods and becomes part of the basis of the bargain." (U.C.C. 2313(1)(a).) And Official Comment 3 observes: "In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof."

The effect of the obscure phrase, "part of the basis of the bargain," has been the subject of some comment and disagreement. In *Hauter v. Zogarts* (1975) 14 C.3d 104, 120 C.R. 681, 534 P.2d 377, the court upheld recovery mainly on fraud (see 5 *Summary* (10th), *Torts*, §778), but also on express warranty. In discussing the latter issue, the court pointed out that some commentators say that the phrase merely shifts the burden of proving nonreliance to the seller; others say that it eliminates the concept of reliance. (14 C.3d 115, 116.) Cases from other jurisdictions generally have ignored the new standard and have treated reliance as still a vital ingredient. (14 C.3d 116, footnote 13.) Since plaintiffs showed reliance, the issue was left unresolved. (14 C.3d 116; see *Fogo v. Cutter Laboratories* (1977) 68 C.A.3d 744, 760, 137 C.R. 417 [dictum suggesting that reliance is still a vital ingredient]; *Keith v. Buchanan* (1985) 173 C.A.3d 13, 23, 220 C.R. 392, *supra*, §57 ["the concept of reliance has been purposefully abandoned"]; *Kazerouni v. De Satnick* (1991) 228 C.A.3d 871, 873, 279 C.R. 74 [whether or not U.C.C. 2313 requires reliance, statute did not apply to seller's misstatements concerning *pattern* of monthly receipts or profits for its business, because *pattern* did not involve *goods* under U.C.C. 2105 (see *supra*, §23)]; 7 *A.L.R.5th* 841 [purchaser's disbelief in, or nonreliance upon, seller's express warranties in contract for sale of business as precluding action for breach].)

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D. Warranties.

2. Express Warranties.

c. Advertisements.

4 Witkin Sum. Cal. Law Sales § 60

[§ 60] Advertisements.

Promises or representations in advertisements or manufacturers' brochures may also serve as the bases of express warranties. In *Lane v. C.A. Swanson & Sons* (1955) 130 C.A.2d 210, 278 P.2d 723, plaintiff bought a can of boned chicken from defendant and suffered injuries from a bone lodging in his throat. The court, holding defendant liable, made the following distinctions: (1) No implied warranty was involved since it had been previously held that the presence of bone fragments is not a breach. (See *infra*, §108.) (2) The label on the can, "Boned Chicken," was an express warranty by description (see *infra*, §61), but by itself might not be breached by an occasional fragment. (130 C.A.2d 213 et seq.) (3) However, in its newspaper advertising of this product appeared the statement "No bones." This representation, relied on by plaintiff, was an express warranty which to a buyer meant that no bones whatever would be found in the product. (130 C.A.2d 215.) (See also *Greenman v. Yuba Power Products* (1963) 59 C.2d 57, 60, 27 C.R. 697, 377 P.2d 897, *infra*, §202 [manufacturer's brochure]; *Keith v. Buchanan* (1985) 173 C.A.3d 13, 22, 220 C.R. 392, *supra*, §57; 3 Anderson 3d (2002 Rev. ed.), §2-313:118 et seq.; 2 American Law of Products Liability 3d, §19:20 et seq.; 8 U.C.L.A. L. Rev. 255; 75 A.L.R.2d 112 [advertising statements as affecting seller's or manufacturer's liability for injury caused by product]; 67A Am.Jur.2d (2003 ed.), Sales §661.)

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D. Warranties.

2. Express Warranties.

d. Description or Designation.

4 *Witkin Sum. Cal. Law Sales* § 61

[§ 61] Description or Designation.

(1) *Characterization as Express Warranty.* The Sales Act classified a warranty by description as an implied warranty (see former C.C. 1734), but it was frequently held that a description that mentioned some quality or type created an express warranty as well (see cases, *infra*, this section). The Code avoids this confusion by defining the warranty by description as an express warranty. (U.C.C. 2313(1)(b); see 3 Anderson 3d (2002 Rev. ed.), §§2-313:78, 2-313:160 et seq.) Thus, the seller's description now creates an express warranty whether or not it designates a particular quality or type.

(2) *Nature of Warranty.* If goods are sold by any description that has been made part of the basis of the bargain, the goods are subject to the seller's warranty that they will conform to that description. (U.C.C. 2313(1)(b); see generally 67A *Am.Jur.2d* (2003 ed.), *Sales* §671 et seq.; cf. former C.C. 1734 ["correspondence" to description required].) A description or designation of the goods as of a certain quality or type, such as "boned chicken" or "a Stradivarius violin," constitutes a warranty of such quality or type. (See *Smith v. Zimbalist* (1934) 2 C.A.2d 324, 333, 38 P.2d 170 ["one Joseph Guarnerius violin and one Stradivarius violin dated 1717"]; *Free v. Sluss* (1948) 87 C.A.2d Supp. 933, 936, 197 P.2d 854 [second sale on basis of same quality of goods sold previously]; *El Zarape Tortilla Factory v. Plant Food Corp.* (1949) 90 C.A.2d 336, 345, 203 P.2d 13 [phrases well-known in trade of particular commodity purchased and sold]; *Mayer v. Northwood Textile Mills* (1951) 105 C.A.2d 406, 408, 233 P.2d 657 [warranties that goods would correspond to both description and sample]; *Webster v. Klassen* (1952) 109 C.A.2d 583, 588, 241 P.2d 302 [seed potatoes would be "Arthur Johnson (Washington) double-O seed from cold storage, with 90-day or better rest period"]; *Square Deal Machine Co. v. Garrett Corp.* (1954) 128 C.A.2d 286, 293, 275 P.2d 46 [telephoned order for certain described article; held a sale by description even though buyer's messenger called for it]; *Lane v. C.A. Swanson & Sons* (1955) 130 C.A.2d 210, 213, 278 P.2d 723, *supra*, §60 [descriptive names]; *Klein v. Asgrow Seed Co.* (1966) 246 C.A.2d 87, 96, 54 C.R. 609, *infra*, §94, quoting the text [tomato seed in sealed cans labeled VF-36, a new special variety ordered]; 7 *So. Cal. L. Rev.* 99; 9 *So. Cal. L. Rev.* 169; 8 *U.C.L.A. L. Rev.* 288; cf. *Du Val Moore & Co. v. Ward* (1939) 31 C.A.2d 205, 209, 87 P.2d 732 [descriptive words in sale of scrap metal held to constitute mere identification of subject matter and not warranty of quality or content].)

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4 Witkin Sum. Cal. Law Sales § 62

[§ 62] Sample or Model.

(1) *Nature of Warranty.* The Sales Act created an *implied* warranty, in a contract to sell or a sale by sample, that the *bulk* would *correspond* with the sample in quality. (Former C.C. 1736(a); see *Free v. Sluss* (1948) 87 C.A.2d Supp. 933, 936, 197 P.2d 854; *T.V. Wire Products v. Osipow Elec. Supply Co.* (1962) 204 C.A.2d 522, 526, 22 C.R. 384.) The Commercial Code changes the characterization of the warranty to *express* and requires that the *whole* of the goods conform to the sample or model. The warranty arises whenever a sample or model is "made part of the basis of the bargain." (U.C.C. 2313(1)(c); see generally 67A Am.Jur.2d (2003 ed.), Sales §673 et seq.)

The Consumer Warranty Act (supra, §52) creates a similar express warranty that the whole of consumer goods will conform to any sample or model. (C.C. 1791.2(a)(2); see 4 Pacific L. J. 187.)

(2) *Sample and Model Distinguished.* Former C.C. 1736 referred only to sales by samples; but sales by models, i.e., goods not drawn from an existing bulk, were included in this concept. (See *Free v. Sluss*, supra [sale of 25 cases of soap; subsequent offer and acceptance of another shipment of "same soap" held sale by sample].) U.C.C. 2313(1)(c) expressly extends the warranty to sales by models. Official Comment 6 states that the distinction between the two types of sales is in the factual determination whether the displayed merchandise is intended to "be" (sample) or merely to "suggest" (model) the actual goods. (See C.E.B., 1 UCC Sales and Leases, §3.20; 8 U.C.L.A. L. Rev. 290.)

(3) *Inspection of the Goods.* Formerly, the warranty was implied only where the sale was actually by sample, i.e., where the parties contracted with reference to the sample. (See *Browning v. McNear* (1904) 145 C. 272, 279, 78 P. 722.) If the buyer actually inspected the bulk of the goods and bought as a result of such inspection, the warranty was not implied even though a sample had previously been exhibited. (*Loose v. Flickinger* (1932) 121 C.A. 77, 79, 8 P.2d 517; see 12 A.L.R.2d 524, 541 [examination of goods as factor in determining whether sale was "by sample"].) The same may be true under the Code. If the buyer has relied upon his or her own inspection, there may have been no intent to make the sample or model "part of the basis of the bargain." (See 3 Anderson 3d (2002 Rev. ed.), §2-313:169; on exclusion of *implied warranties* by examination of a sample or model, see infra, §80.)

Former C.C. 1736(b) implied a further warranty in a sale by sample that the buyer would have a reasonable opportunity of comparing the bulk with the sample. Although this "warranty" was omitted from the warranty provisions

of the Code, the buyer retains the right to examine the goods under the general provisions of U.C.C. 2513(1). (See *infra*, §149.)

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D. Warranties.

2. Express Warranties.

f. New Motor Vehicle Warranties.

1. In General.

4 Witkin Sum. Cal. Law Sales § 63

[§ 63] In General.

Warranties made in connection with the sale of new motor vehicles are usually to the effect that the vehicle will be free from defects for a specified period of time or miles of use. (See, e.g., *Rose v. Chrysler Motors Corp.* (1963) 212 C.A.2d 755, 758, 28 C.R. 185; *Gherna v. Ford Motor Co.* (1966) 246 C.A.2d 639, 651, 55 C.R. 94; 2 A.L.R.4th 576 [warranty limiting manufacturer's liability to repair or replacement of defective parts]; 40 A.L.R.4th 1218 [manufacturer's liability for injuries caused by repairs made under warranty].)

Veh.C. 28052 deals with the warranty of a manufacturer, distributor, or dealer based on mileage. Only those miles driven "on and after the date that the motor vehicle has first been sold as new to the purchaser" may be considered, and the mileage indicated on the odometer at that time is the mileage on which the warranty commences. (On manufacturer's duty to correct defects relating to motor vehicle safety after expiration of warranty period, see *Veh.C.* 9975; on provisions of Song-Beverly Consumer Warranty Act (C.C. 1790 et seq.) applicable to new motor vehicle sales, see *infra*, §318 et seq.)

Under vehicular air pollution control provisions of the Health and Safety Code, a motor vehicle manufacturer is required to warrant that a vehicle will comply with applicable emission standards for a period that varies according to the nature of the vehicle (*Health & Saf.C.* 43204 et seq.), and can be required to take remedial action in case of noncompliance (*Health & Saf.C.* 43009.5).

On the sale of a new "housecar" (motor vehicle equipped for human habitation or to which a camper is permanently attached), the dealer must give the buyer a list of every express warranty, of which the dealer has notice, issued by a manufacturer, dealer or any other party. (*Veh.C.* 11931.)

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See *Daugherty v. American Honda Motor Co.* (2006) 144 C.A.4th 824, 830, 51 C.R.3d 118 [manufacturer's warranty providing for repair or replacement of defective parts for 3 years or 36,000 miles did not cover latent defects that did not lead to malfunction until after warranty period expired].



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D. Warranties.

2. Express Warranties.

f. New Motor Vehicle Warranties.

2. Adjustment Programs.

4 Witkin Sum. Cal. Law Sales § 64

[§ 64] Adjustment Programs.

C.C. 1795.90 et seq. govern motor vehicle warranty adjustment programs. An "adjustment program" is "any program or policy that expands or extends the consumer's warranty beyond its stated limit or under which a manufacturer offers to pay for all or any part of the cost of repairing, or to reimburse consumers for all or any part of the cost of repairing, any condition that may substantially affect vehicle durability, reliability, or performance, other than service provided under a safety or emission-related recall campaign." (C.C. 1795.90(d).)

Within 90 days after adopting an adjustment program, manufacturers must notify by first-class mail all owners or lessees of eligible motor vehicles of the condition giving rise to the program, and the principal terms and conditions. (C.C. 1795.92(a).) Manufacturers must also, within 30 days after adopting the program, provide written notice to dealers of the program's terms and conditions. (C.C. 1795.92(c).) Additionally, manufacturers must implement procedures to assure reimbursement of consumers eligible under an adjustment program who, before acquiring knowledge of the program, incurred expenses to repair a covered condition. (C.C. 1795.92(d); see C.C. 1795.92(e) [consumer's right to file claim for reimbursement under C.C. 1795.92(d)].)

If a dealer has received a service bulletin concerning an adjustment program, the dealer must disclose the program's principal terms to a consumer seeking repairs for a covered condition at the dealer's repair shop. (C.C. 1795.91(b).)

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D. Warranties.

2. Express Warranties.

g. Mobilehome Warranties.

4 Witkin Sum. Cal. Law Sales § 65

[§ 65] Mobilehome Warranties.

(1) *Scope of Statute.* All new mobilehomes and manufactured homes sold to a buyer must be covered by the warranty set forth in C.C. 1797 et seq. (C.C. 1797.) This requirement applies to manufacturers, dealers, and contractors, and covers the electrical, plumbing, heating, cooling, fire safety, and structural systems, as well as all appliances installed or manufactured by the dealer, manufacturer, or contractor. (C.C. 1797.2; see Cal. Transactions Forms, 5 Business Transactions §§33:45, 33:46.)

(2) *Warranty Document.* C.C. 1797.3 requires the warranty from the contractor, manufacturer, or dealer to be stated in a separate written document that reprints all of the provisions of C.C. 1797 et seq. It must be delivered to the buyer by the contractor or dealer when the contract of sale is signed, and must contain at least the following terms:

(a) That the mobilehome or manufactured home is free from any "substantial defects in materials or workmanship" (defined in C.C. 1797.1(d)).

(b) That the manufacturer, dealer, or contractor (or any or all of them) will take corrective action at the mobilehome or manufactured home site in instances of substantial defects in materials or workmanship that become evident within 1 year after delivery. However, the buyer or the buyer's transferee must give written notice of the defect to the manufacturer, dealer, or contractor within 1 year and 10 days after delivery.

(c) That the manufacturer and the dealer or contractor will be jointly and severally liable to the buyer for fulfillment of the warranty terms, and that the buyer may notify one or both of the need for corrective action.

(d) That the address or phone number of where to mail or deliver written notices of defects will be set forth in the document.

(e) That the 1-year warranty period applies to the plumbing, heating, electrical, cooling, fire safety, and structural systems and all appliances.

(f) That although appliance manufacturers may issue their own warranties, the primary responsibility for corrective action under the warranty rests with the contractor or dealer and the manufacturer, and the buyer should initially report

all complaints to them.

(g) That if the manufacturer's, dealer's, or contractor's corrective action fails to eliminate a substantial defect, the material, system, appliance, or component will be "replaced in kind." "Replaced in kind" means replacement with the identical material, system, appliance, or component if available, and if not, replacement with a *comparable or better* material, system, appliance, or component.

(3) *Deadline for Correcting Defects.* A contractor, dealer, or manufacturer must complete warranty service to correct all substantial defects within 90 days of receiving the buyer's written notice, except in the case of "circumstances which are beyond the control of the contractor, dealer, or manufacturer." (C.C. 1797.7.)

(4) *Rights Cumulative.* The warranty provided by C.C. 1797 et seq. is *in addition to*, and not in derogation of, the buyer's rights and privileges under any other law or instrument. (C.C. 1797.4; on availability of remedies under Song-Beverly Consumer Warranty Act (C.C. 1790 et seq.), see *National R.V. v. Foreman* (1995) 34 C.A.4th 1072, 1079, 40 C.R.2d 672, *infra*, §318.)

(5) *Waiver Prohibited.* The manufacturer, dealer, or contractor may not require the buyer to waive his or her rights under C.C. 1797 et seq. Any such waiver is contrary to public policy, unenforceable, and void. (C.C. 1797.4.)

(6) *Display of Notice.* Dealers and contractors must display a copy of all of the warranty provisions required by C.C. 1797 et seq. The copy must be posted in each area where purchase orders and conditional sales contracts are written. (C.C. 1797.5.)

(7) *Records.* Manufacturers, contractors, and dealers must keep records of all actions taken under C.C. 1797 et seq., including all correspondence with the buyer for 3 years from the date of delivery. (C.C. 1797.6.)

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D. Warranties.

2. Express Warranties.

h. Home Roof Warranties.

4 *Witkin Sum. Cal. Law Sales* § 66

[§ 66] Home Roof Warranties.

(1) *Contracts and Warranties Subject to Regulation.* C.C. 1797.90 et seq. apply to contracts and warranties for the installation, repair, or replacement of the roof of a residential structure. A "residential structure" includes manufactured homes and mobilehomes. (C.C. 1797.90.)

(2) *Writing Required.* A contract for roofing materials, or for the installation, repair, or replacement of the roof of a residential structure, must be in writing if the contract includes a warranty of materials or workmanship that extends beyond completion of the work. (C.C. 1797.91.)

(3) *Enforcement by Subsequent Purchasers.* For contracts subject to C.C. 1797.90 et seq. and entered into on or after January 1, 1994, the warranty obligations inure to the benefit of, and are directly enforceable by, all subsequent purchasers and transferees of the residential structure. (C.C. 1797.92.) A warranty subject to C.C. 1797.90 et seq. also inures to the benefit of, and is directly enforceable by, all subsequent purchasers and transferees. (C.C. 1797.94.) Enforceability is without limitation, unless (a) the contract contains a "clear and conspicuous" provision limiting transferability of the warranty (C.C. 1797.92); or (b) the warranty contains a provision limiting transferability, set forth at the top of the first page of the warranty in 14-point boldface type, and enclosed in a rectangular box in at least 4-point type (C.C. 1797.94).

(4) *Use of Term "Lifetime."* A warranty that uses the term "lifetime," "life," or a similar term to describe the duration of the warranty must disclose "with such clarity and prominence as will be noticed and understood by prospective purchasers" the life to which the representation refers. (C.C. 1797.93; see C.C. 1797.94(b) [disclosure required by C.C. 1797.93 must be set forth at top of first page of warranty in 14-point boldface type, and enclosed in rectangular box in at least 4-point type].)

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D. Warranties.

3. Implied Warranties.

a. Title.

4 Witkin Sum. Cal. Law Sales § 67

[§ 67] Title.

Unless excluded or modified (see *infra*, §83), there is a warranty of title in every sales contract. (U.C.C. 2312(1); see Clark & Smith, *The Law of Product Warranties*, Chap. 3; 47 *A.L.R.5th* 677 [implied warranties of title, merchantability, and fitness for particular purpose in sale of used motor vehicle]; 67A *Am.Jur.2d* (2003 ed.), *Sales* §729 et seq.) The seller warrants that:

(1) The title conveyed is good. (U.C.C. 2312(1)(a); see 2A Anderson 3d (1997 Rev. ed.), §2-312:31 et seq.)

(2) The seller has a right to transfer the title. (U.C.C. 2312(1)(a); on agent's authority to warrant principal's title, see 3 *Summary* (10th), *Agency and Employment*, §136.)

(3) "The goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge." (U.C.C. 2312(1)(b), and see Official Comment 1 ["actual knowledge as distinct from notice" is required]; for definition of "knowledge," see U.C.C. 1201(25)(c), *supra*, §17.)

The warranty of quiet possession was omitted from the Code. The drafters considered a disturbance of quiet possession as merely one of the acts which establish a breach of the warranty of title. (U.C.C. 2312, Official Comment 1; but see 63 *Harv. L. Rev.* 578 [criticism by Williston of the omission].)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Title conveyed is good:* See 2A Anderson 3d (2008 Rev. ed.), §2-312:38 et seq.

(3) *Goods delivered free of encumbrance:* U.C.C. 1201(25)(c), defining "knowledge," was renumbered U.C.C. 1202(b) in 2006 without substantive change.



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3. Implied Warranties.

b. Against Infringement.

4 Witkin Sum. Cal. Law Sales § 68

[§ 68] Against Infringement.

The Commercial Code creates a new warranty against infringement. The drafters indicate that the infringement contemplated is of a patent or trademark (see U.C.C. 2312, Official Comment 3); they did not consider the question whether the warranty protection extends also to copyright infringement. (See *10 U.C.L.A. L. Rev. 1146*; C.E.B., 1 UCC Sales and Leases, §§3.44, 3.45; and see generally *67A Am.Jur.2d (2003 ed.)*, Sales §§754, 755.)

(1) *Warranty by Merchant Seller.* Where the seller is a merchant (see *supra*, §28) who regularly deals in goods of the kind sold, the seller warrants that the goods will be "delivered free of the rightful claim of any third person by way of infringement or the like." (U.C.C. 2312(3).)

(2) *Warranty by Buyer.* A buyer who furnishes specifications of goods to be prepared or otherwise manufactured warrants that the buyer will hold the seller harmless against any claim of infringement arising out of the seller's compliance. (See U.C.C. 2312(3).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Warranty by Merchant Seller.* U.C.C. 2312(3) requires the seller to warrant that the goods in question are "free of the rightful claim of any third person by way of infringement or the like." A rightful claim within the meaning of the statute is "a nonfrivolous claim of infringement that has any significant and adverse effect on the buyer's ability to make use of the purchased goods. ... [It is not limited to] claims that ultimately prove (or are expected to prove) successful in litigation." (*Pacific Sunwear of Calif. v. Olaes Enterprises (2008) 167 C.A.4th 466, 470, 477, 84 C.R.3d 182* [in action under U.C.C. 2312(3) by clothing retailer against T-shirt supplier, trial judge erred in granting summary judgment for supplier on ground that, in federal court infringement action by third party against retailer arising out of retailer's sale of T-shirts, federal court had denied third party's request for preliminary injunction based on finding that there was no likelihood of confusion].)



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c. Merchantability.

1. Any Sale by Merchant.

4 Witkin Sum. Cal. Law Sales § 69

[§ 69] Any Sale by Merchant.

The Sales Act limited warranties of merchantability to sales by description or sample by a dealer in goods of the kind sold. (See former C.C. 1735(2), 1736(c).)

Under the Commercial Code, unless excluded or modified (see *infra*, §89), a warranty of merchantability is implied in any sale by a seller who is a merchant (see *supra*, §28) with respect to goods of the kind sold. (U.C.C. 2314(1); see 34 *Hastings L. J.* 747 [recommendation that U.C.C. 2314 "merchant" restriction be eliminated]; 31 *U.S.F. L. Rev.* 531 [suggesting implied warranty of merchantability be made inapplicable to sales of computer software]; Clark & Smith, *The Law of Product Warranties*, Chap. 5; Cal. Civil Practice, 4 Business Litigation, §40:83; 78 *A.L.R.3d* 696 [what constitutes contract for sale for purposes of warranty of merchantability]; 91 *A.L.R.3d* 876 [who is "merchant" under Unif.Com.C. §2-314(1)]; 67A *Am.Jur.2d* (2003 ed.), *Sales* §680 et seq.; 26 *Proof of Facts* 2d 1 [implied warranty of merchantability]; on implied warranty of merchantable quality in sale of real property, see 12 *Summary* (10th), *Real Property*, §463.)

Application is no longer limited to sales by description or sample, although an examination of the goods or of a sample or model may exclude the warranty. (See *infra*, §80.) The warranty is applicable to the service of food or drink for consumption. (See *infra*, §104.)

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2. Consumer Goods Sold at Retail.

4 Witkin Sum. Cal. Law Sales § 70

[§ 70] Consumer Goods Sold at Retail.

The Consumer Warranty Act extends the protection of the warranty for consumer goods (see *supra*, §52) to sales not covered by the Commercial Code, such as sales by a nonmerchant. The Act provides that consumer goods sold at retail "shall be accompanied by the manufacturer's and the retail seller's implied warranty that the goods are merchantable." (C.C. 1792 [providing retail seller with right of indemnity against manufacturer]; see C.C. 1791.1(c) [duration of the warranty]; Cal. Civil Practice, 5 Business Litigation, §53.6; 4 *Pacific L. J.* 188; on disclaimer, see *infra*, §90.)

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c. Merchantability.

3. "Merchantable" Quality.

4 Witkin Sum. Cal. Law Sales § 71

[§ 71] "Merchantable" Quality.

Under the Sales Act, the warranty was that the goods were of "merchantable quality" or free from certain defects rendering them "unmerchantable." (See former C.C. 1735(2), 1736(c); *Burr v. Sherwin Williams Co.* (1954) 42 C.2d 682, 694, 268 P.2d 1041; *Moore v. Hubbard & Johnson Lumber Co.* (1957) 149 C.A.2d 236, 241, 308 P.2d 794.)

The Commercial Code contains a more objective definition. U.C.C. 2314(2) provides that, to be merchantable, goods "must be at least such as

- (a) Pass without objection in the trade under the contract description; and
- (b) In the case of fungible goods, are of fair average quality within the description; and
- (c) Are fit for the ordinary purposes for which such goods are used; and
- (d) Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
- (e) Are adequately contained, packaged, and labeled as the agreement may require; and
- (f) Conform to the promises or affirmations of fact made on the container or label if any."

The Code definition establishes only minimum requirements. Official Comment 6 states that these criteria are not exhaustive of the meaning of merchantability and there is no intent to exclude attributes not specifically mentioned. (See generally 8 U.C.L.A. L. Rev. 292; 83 A.L.R.3d 694 [what are "merchantable" goods within meaning of Unif.Com.C. §2-314].)

The warranty of merchantability under the Consumer Warranty Act adopts four of the Commercial Code's six criteria, omitting (b) and (d) above, which would presumably not be relevant to consumer sales. (See C.C. 1791.1(a); 4 *Pacific L. J.* 191.)

In *Hauter v. Zogarts* (1975) 14 C.3d 104, 120 C.R. 681, 534 P.2d 377, defendants, who sold a golfers' training device with a representation of safety, were held liable in tort (see 5 *Summary* (10th), *Torts*, §778), on express warranty (see *supra*, §59), and also on implied warranty under the tests of U.C.C. 2314(2)(c) and (2)(f): The device did not conform to the affirmations on the container, and it was not fit for the ordinary purposes for which such goods are used--for training of beginners, not expert golfers. (14 C.3d 117, 118; see *American Suzuki Motor Corp. v. Superior Court* (1995) 37 C.A.4th 1291, 1295, 1297, 44 C.R.2d 526, 4 Cal. Proc. (4th), *Pleading*, §256 [distinguishing *Hauter*; alleged tendency of sport utility vehicle model to roll over did not support class action for breach of implied warranty of merchantability; vehicles of majority of class members had not rolled over and thus were fit for ordinary purposes for which they were intended]; 74 A.L.R.3d 1298 [statements on container enclosing toy or sports equipment as affecting manufacturer's liability for injury caused by product].)

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SUPPLEMENT: [This section is current through the latest supplement]

See *Isip v. Mercedes-Benz USA, LLC* (2007) 155 C.A.4th 19, 23, 65 C.R.3d 695 [in action for breach of implied warranty of merchantability arising from car that emitted offensive odor and had noticeable problems when gears were shifted, trial judge properly instructed in language of CACI, No. 3210, with additional language stating that fitness for ordinary purpose means vehicle is in safe condition and substantially free of defects; manufacturer's proposed language to effect that implied warranty does not require that good precisely fulfill buyer's expectations was properly rejected]; CACI, No. 3210 [Breach of Implied Warranty of Merchantability--Essential Factual Elements]. *American Suzuki Motor Corp. v. Superior Court*:

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §281.



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1. Nature and Scope.

aa. In General.

4 *Witkin Sum. Cal. Law Sales* § 72

[§ 72] In General.

(1) *Commercial Code*. Where a seller has reason to know at the time of contracting that the buyer desires goods to be used for a particular purpose and relies on the seller's skill and judgment in selecting or furnishing such goods, a warranty is implied by law, unless excluded or modified (see *infra*, §88), that the goods will be fit for that purpose. (U.C.C. 2315; see *Drumar Mining Co. v. Morris Ravine Mining Co.* (1939) 33 C.A.2d 492, 497, 92 P.2d 424, *infra*, §73; *Paul v. Williams* (1944) 64 C.A.2d 696, 702, 149 P.2d 284 [nursery stock]; *Bagley v. International Harvester Co.* (1949) 91 C.A.2d 922, 924, 206 P.2d 43 [insufficient pleading of elements of warranty]; *Tremeroli v. Austin Trailer Equipment Co.* (1951) 102 C.A.2d 464, 476, 227 P.2d 923 [defective fifth wheel coupling tractor and trailer]; *United States Credit Bureau v. Powell* (1953) 121 C.A.2d Supp. 870, 873, 264 P.2d 229 [sufficient pleading and offer of proof]; *Eichler Homes v. Anderson* (1970) 9 C.A.3d 224, 231, 87 C.R. 893 [steel tubing to be used in radiant heating system]; *Williams v. Beechnut Nutrition Corp.* (1986) 185 C.A.3d 135, 142, 229 C.R. 605 [glass juice bottle intended for use by infants]; 43 Cal. L. Rev. 618; 56 Cal. L. Rev. 168 [patent, know-how, and technical assistance licensing agreements]; 24 So. Cal. L. Rev. 221 ["contact dermatitis" from sale of cosmetics or improperly dyed clothes]; 8 U.C.L.A. L. Rev. 296; 2 American Law of Products Liability 3d, §20:23 et seq.; Clark & Smith, *The Law of Product Warranties*, Chap. 6; 15 A.L.R.3d 1207 [air-conditioning equipment]; 17 A.L.R.3d 1010, 1070 [decision under Unif.Com.C. 2-315]; 83 A.L.R.3d 656 [warranty of fitness for particular purpose as including fitness for ordinary use]; 83 A.L.R.3d 669 [what constitutes "particular purpose"]; 47 A.L.R.4th 238 [applicability of warranty to suppliers or equipment used in performance of service contract]; 67A Am.Jur.2d (2003 ed.), *Sales* §696 et seq.; 27 Proof of Facts 2d 243 [implied warranty of fitness for particular purpose].)

(2) *Consumer Warranty Act*. Where consumer goods (see *supra*, §52) are sold at retail by a manufacturer, retailer, or distributor who has reason to know a particular purpose for which the goods are required and that the buyer is relying on the manufacturer's, retailer's, or distributor's skill or judgment in selecting or furnishing suitable goods, there is an implied warranty of fitness by that manufacturer, retailer, or distributor. (C.C. 1791.1(b), 1792.1, 1792.2(a); see also C.C. 1791.1(c) [duration of warranty]; on disclaimer, see *infra*, §90.) An assistive device (see *supra*, §52) sold at retail must be accompanied by the retail seller's implied warranty that the device is specifically fit for the buyer's particular

needs. (C.C. 1791.1(b), 1792.2(b); see also C.C. 1793.02(d) [C.C. 1792.2(b) must be construed to require that assistive device be specifically fit for particular needs of ultimate user]; C.C. 1793.02(e) [C.C. 1792.2(b) does not apply to certain sales of assistive devices].)

(3) *Relation to Warranty of Merchantability.* The warranty of merchantability sets a standard of fitness for *ordinary* purposes. (See *supra*, §69.) The warranty specified by U.C.C. 2315 is one of fitness for a *particular* purpose. (See *American Suzuki Motor Corp. v. Superior Court* (1995) 37 C.A.4th 1291, 1295, 1297, footnote 2, 44 C.R.2d 526, 4 Cal. Proc. (4th), Pleading, §256 [contrasting the two types of warranty; class action plaintiffs failed to state claim for breach of warranty of fitness for particular purpose based on vehicle's alleged tendency to roll over, where they failed to identify any particular purpose other than general purpose of providing transportation].) The warranties are not mutually exclusive; both may be implied in the same contract. (See U.C.C. 2315, Official Comment 2; *Eichler Homes v. Anderson, supra* [corrosion of tubing used in radiant heating system breached both warranties of merchantability and fitness for particular purpose under former Sales Act]; 8 U.C.L.A. L. Rev. 296; 83 A.L.R.3d 656 [warranty of fitness for particular purpose as including fitness for ordinary use].) Where there is an inconsistency, however, the preference is in favor of the warranty of fitness for a particular purpose. (See U.C.C. 2315, Official Comment 2.)

West's Key Number Digest, Sales k.273(1)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Relation to Warranty of Merchantability.*

American Suzuki Motor Corp. v. Superior Court:

Cross-Reference: 4 Cal. Proc. (5th), Pleading, §281.



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bb. Secondhand Goods.

4 *Witkin Sum. Cal. Law Sales* § 73

[§ 73] Secondhand Goods.

Nothing in U.C.C. 2315 (see *supra*, §72) or the Code definition of "goods" (see *supra*, §23) limits the warranty of fitness for a particular purpose to new items. And in *Drumar Mining Co. v. Morris Ravine Mining Co. (1939) 33 C.A.2d 492, 92 P.2d 424*, decided under the Sales Act, the warranty was implied. Plaintiff, a mining company, sold defendant, another mining company, a used "Huelsdonk Concentrating Gold Washing Machine." Defendant's agents informed plaintiff of the proposed use, and relied on plaintiff's skill and judgment, but knew the machine was secondhand. *Held*, a warranty of fitness was implied. Plaintiff argued that there is no implied warranty of quality in the sale of secondhand machinery, because ordinarily the buyer may inspect, and the parties may be equally informed as to its condition. (33 C.A.2d 497, 498, citing *Lamb v. Otto (1921) 51 C.A. 433, 197 P. 147.*) Here, however, the seller was thoroughly familiar with a complicated machine, the fitness of which could not be determined by mere inspection, but only by an operative test. (33 C.A.2d 499.) (See also *Lindberg v. Coutches (1959) 167 C.A.2d Supp. 828, 832, 334 P.2d 701* [used aircraft]; cf. *Intrastate Credit Service v. Pervo Paint Co. (1965) 236 C.A.2d 547, 552, 46 C.R. 182* [secondhand outdoor sign sold "as is" and open to buyer's inspection; no warranty of fitness]; 9 U.S.F. L. Rev. 539 [availability of implied warranties to buyers of used automobiles]; 47 A.L.R.5th 677 [same].)

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1. Nature and Scope.

cc. Livestock.

4 Witkin Sum. Cal. Law Sales § 74

[§ 74] Livestock.

In a case decided under the Sales Act, the warranty of fitness was implied in the sale of a bull for breeding purposes. (*Willig v. Brethauer* (1954) 127 C.A.2d 650, 652, 274 P.2d 202; see 61 A.L.R.3d 811 [recovery for breach of warranty on contracts for artificial insemination of cattle]; 35 Proof of Facts 2d 607 [misrepresentation or breach of warranty in sale of animal].) But in 1957, former Ag.C. 328 was adopted, stating that "in the absence of an express warranty, the mere sale of livestock shall not be construed to imply a warranty of such livestock for any particular purpose." And in 1961, former Ag.C. 329 excluded all warranties of fitness or merchantability in the sale of livestock for slaughter, notwithstanding former C.C. 1735(1), (2), (5).

It is unclear what effect subsequent legislation has had upon these provisions. It could be argued that they conflicted with the general Commercial Code provision on warranty of fitness and were therefore invalidated by the general repealer contained in the Code (see U.C.C. 13103). They were, however, renumbered *Food & Ag.C. 18501* and *18502* in 1967 and reenacted with little change, together with an obsolete reference to the former Sales Act. (See C.E.B., 1 UCC Sales and Leases, §3.30.)

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2. Elements of Warranty.

aa. Seller's Status and Knowledge of Buyer's Purpose.

4 Witkin Sum. Cal. Law Sales § 75

[§ 75] Seller's Status and Knowledge of Buyer's Purpose.

(1) *Seller Need Not Be a Merchant.* The warranty of fitness for a particular purpose is not limited to sales by a merchant as is the warranty of merchantability (see *supra*, §69). It may be imposed on any seller possessing sufficient skill and judgment to justify the buyer's reliance. (See U.C.C. 2315.) The Code drafters suggest, however, that a nonmerchant seller will only in particular circumstances have that degree of skill and judgment necessary to justify imposing the warranty. (Official Comment 4; see 3A Anderson 3d (2002 Rev. ed.), §2-315:96 et seq.)

(2) *Knowledge of Buyer's Intended Purpose.* Under former C.C. 1735(1), the warranty would be implied only when the buyer "expressly or by implication" made his or her particular purpose known to the seller. Under the Code, it is not necessary for the buyer to communicate a purpose to the seller; it is sufficient that the seller "has reason to know any particular purpose for which the goods are required." (U.C.C. 2315, and see Official Comment 1; 3A Anderson 3d (2002 Rev. ed.), §2-315:100.)

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2. Elements of Warranty.

bb. Reliance by Buyer.

4 Witkin Sum. Cal. Law Sales § 76

[§ 76] Reliance by Buyer.

(1) *In General.* Under the Sales Act, the warranty arose only if the buyer relied on the seller's skill or judgment. (Former C.C. 1735(1); see *Sutter v. Associated Seed Growers* (1939) 31 C.A.2d 543, 546, 88 P.2d 144; *Lindberg v. Coutches* (1959) 167 C.A.2d Supp. 828, 832, 334 P.2d 701; *Russell v. George Rose & Co.* (1969) 276 C.A.2d 456, 459, 80 C.R. 755, citing the text [under former C.C. 1735, buyer has burden of proving reliance].) U.C.C. 2315 requires only that the seller have "reason to know" that the buyer is relying on the seller's skill or judgment in selecting or furnishing suitable goods, but Official Comment 1 states that actual reliance is required. (See *Keith v. Buchanan* (1985) 173 C.A.3d 13, 25, 220 C.R. 392, supra §57 [evidence supported theory of express warranty but no reliance sufficient for implied warranty]; 3A Anderson 3d (2002 Rev. ed.), §2-315:113 et seq.)

(2) *Sale by Brand Name.* The Code omits the Sales Act provision excepting the sale of goods by patent or tradename from the warranties of fitness. (U.C.C. 2315; cf. former C.C. 1735(4); *Drumar Mining Co. v. Morris Ravine Mining Co.* (1939) 33 C.A.2d 492, 495, 92 P.2d 424, supra, §73; *Odell v. Frueh* (1956) 146 C.A.2d 504, 510, 304 P.2d 45; *Lindberg v. Coutches*, supra, 167 C.A.2d Supp. 832.) Official Comment 5 states that the purchase by brand name is but one factor bearing on the question whether there was reliance on the seller's skill and judgment; it is "not of itself decisive of the issue."

(3) *Goods Manufactured to Buyer's Specifications.* The warranty of fitness for a particular purpose does not apply where the seller manufactured the goods according to and in conformity with plans and specifications furnished by the buyer. (*Fernholtz Machinery Co. v. Wilson* (1931) 118 C.A. 573, 581, 5 P.2d 679; *Carpenter Steel Co. v. Pellegrin* (1965) 237 C.A.2d 35, 37, 46 C.R. 502.) In this situation the buyer does not rely on the seller's skill or judgment but on his or her own. (See U.C.C. 2316, Official Comment 9.) But if the seller states a willingness to comply with the specifications, this may be an *express* warranty that the goods will conform to the specifications. (See *Carpenter Steel Co. v. Pellegrin*, supra, 237 C.A.2d 38; 61 So. Cal. L. Rev. 237 [The Buyer's Specifications Exception to the Implied Warranty of Fitness for a Particular Purpose: Design or Performance?]; supra, §56.)

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d. Fitness for Particular Purpose.

3. Fitness.

4 Witkin Sum. Cal. Law Sales § 77

[§ 77] Fitness.

(1) *Standard of Fitness.* The warranty under the Sales Act was that the goods would be "reasonably fit" for the particular purpose. (Former C.C. 1735(1).) This provision was construed to require only that the goods be reasonably fit for the purpose for which they were purchased and not that they be the best on the market. (*Schied v. Bodinson Mfg. Co.* (1947) 79 C.A.2d 134, 141, 179 P.2d 380.) Fitness is, of course, a question of fact, and evidence of actual use is a simple method of proving unfitness. "When a mechanical device fails in normal use and has been properly maintained, that is a field test that supports the implied finding of the jury that it was not reasonably fit for the purpose intended. The testimony of the experts as to tests made by them merely creates a conflict." (*Tremeroli v. Austin Trailer Equipment Co.* (1951) 102 C.A.2d 464, 476, 227 P.2d 923.)

U.C.C. 2315 deleted the word "reasonably" and provides that the goods "shall be fit," indicating that goods will probably be held to a higher standard under the Code. (See C.E.B., 1 UCC Sales and Leases, §3.33 et seq.; 67A *Am.Jur.2d* (2003 ed.), *Sales* §710.)

(2) *Fitness for Related Purpose.* Under U.C.C. 2315, as under former C.C. 1735(1), the implied warranty is for the "particular purpose for which the goods are required." In *Simmons v. Rhodes & Jamieson, Ltd.* (1956) 46 C.2d 190, 293 P.2d 26, plaintiff purchased ready-mixed cement from defendant to put in his own basement floor. Despite normal precautions (galoshes and rubber gloves), the wet cement soaked through his clothes giving him third-degree burns. A judgment of nonsuit was affirmed on the ground that the cement was fit for the purpose (laying a floor) and was of merchantable quality. (46 C.2d 194.) A dissenting opinion argued that the warranty of fitness in this situation should include not only the primary warranty that the cement was fit for a floor but also a secondary warranty that it was reasonably safe to handle in constructing the floor. (See also 8 U.C.L.A. L. Rev. 299; on warranties of beverage bottles, see *infra*, §107.)

SUPPLEMENT: [This section is current through the latest supplement]



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e. Warranty Arising From Custom or Usage.

4 Witkin Sum. Cal. Law Sales § 78

[§ 78] Warranty Arising From Custom or Usage.

Unless excluded or modified (see *infra*, §84 et seq.), an implied warranty may be created by "course of dealing or usage of trade." (U.C.C. 2314(3); for definitions of these terms, see U.C.C. 1205; and see generally 3 Anderson 3d (2002 Rev. ed.), §2-314:105; BAJI, No. 9.62; 67A *Am.Jur.2d* (2003 ed.), Sales §727; 6 *Am.Jur. P.P. Forms* (1993 Rev. ed.), Commercial Code §2:221 et seq.) An example of such a warranty is the obligation in the sale of a pedigreed animal to provide pedigree papers. (See U.C.C. 2314, Official Comment 12.)

SUPPLEMENT: [This section is current through the latest supplement]
The definitions contained in U.C.C. 1205 were transferred to U.C.C. 1303 in 2006.



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4. Exclusion or Modification.

a. Usage or Custom.

4 *Witkin Sum. Cal. Law Sales* § 79

[§ 79] Usage or Custom.

Implied warranties may be "excluded or modified by course of dealing or course of performance or usage of trade." (U.C.C. 2316(3)(c); see 3A Anderson 3d (2002 Rev. ed.), §2-316:73 et seq.; C.E.B., 1 UCC Sales and Leases, §§3.58, 3.124; BAJI, No. 9.82; 8 *U.C.L.A. L. Rev.* 317.) Comment 5 states that U.C.C. 2316(3)(c) is in accord with prior California law. (On prior California law, see former C.C. 1791; *Miller v. Germain Seed & Plant Co.* (1924) 193 C. 62, 75, 76, 222 P. 817; *El Zarape Tortilla Factory v. Plant Food Corp.* (1949) 90 C.A.2d 336, 346, 203 P.2d 13 [custom excluding warranty of fitness for human consumption]; 12 *Cal. L. Rev.* 523; 1 *So. Cal. L. Rev.* 85.)

However, a custom cannot contradict the terms of the contract, and therefore will not negative an *express* warranty. (See U.C.C. 2208(2) [express terms control course of performance and course of performance controls course of dealing and usage of trade]; 8 *U.C.L.A. L. Rev.* 318, footnote 234; on similar pre-Code law, see *Brandenstein v. Jackling* (1929) 99 C.A. 438, 446, 278 P. 880; *Webster v. Klassen* (1952) 109 C.A.2d 583, 589, 241 P.2d 302; *India Paint & Lacquer Co. v. United Steel Products Corp.* (1954) 123 C.A.2d 597, 613, 267 P.2d 408.)

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SUPPLEMENT: [This section is current through the latest supplement]

U.C.C. 2208(2) was repealed in 2006. Under U.C.C. 1303(e), as amended in 2006, in case of a conflict, "express terms prevail over course of performance, course of dealing, and usage of trade."



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b. Examination by Buyer.

4 Witkin Sum. Cal. Law Sales § 80

[§ 80] Examination by Buyer.

Under U.C.C. 2316(3)(b) implied warranties may be excluded by the buyer's examination of goods or a refusal to examine them: "When the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him." (See 3A Anderson 3d (2002 Rev. ed.), §2-316:197 et seq.; C.E.B., 1 UCC Sales and Leases, §§3.32, 3.57, 3.64; BAJI, No. 9.72; 8 *U.C.L.A. L. Rev.* 317; on similar pre-Code law, see former C.C. 1735(3); *Pacific Commercial Co. v. Greer* (1933) 129 C.A. 751, 756, 19 P.2d 543; *Webster v. Klassen* (1952) 109 C.A.2d 583, 592, 241 P.2d 302 [examination held not a waiver]; 7 *So. Cal. L. Rev.* 101.)

Official Comment 8 sets forth the following guidelines: (1) The examination referred to is one prior to entering into the contract and should be distinguished from inspection prior to acceptance of the goods (see U.C.C. 2513, *infra*, §149). (2) Actual examination is required, not mere opportunity to examine. However, a refusal to examine after a demand by the seller will exclude the warranties. (3) Whether a particular defect is excluded by an examination depends upon the buyer's skill, the normal method of examining goods in the circumstances, and the detectability of the defect. But a "failure to notice defects which are obvious cannot excuse the buyer."

SUPPLEMENT: [This section is current through the latest supplement]

See *Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 C.A.4th 937, 950, 56 C.R.3d 177, 5 Summary (10th), *Torts*, Supp., §118 [in action by buyer of oil seals against manufacturer, implied warranty of merchantability was not excluded under U.C.C. 2316(3)(b), notwithstanding that buyer tested sample seals, where substantial evidence supported trial judge's finding that abrasiveness of seals was not defect buyer ought to have discovered].



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c. Proof of Purchase Forms.

4 Witkin Sum. Cal. Law Sales § 81

[§ 81] Proof of Purchase Forms.

Warranties in retail sales have been excluded in the past by requirements that the purchaser fill out and return a form to the manufacturer or seller as proof of purchase. This practice was restricted in 1970 by the enactment of U.C.C. 2800, 2801. These statutes apply to the retail sale of "goods used or bought for use primarily for personal, family or household purposes." (U.C.C. 2800). Under U.C.C. 2801, a written warranty or guarantee as to the condition or quality of the goods "shall not be unenforceable solely because the buyer fails to complete or return the form," and the buyer "must agree in writing to any waiver of this section for the waiver to be valid."

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d. Disclaimer.

1. Express Warranty.

4 Witkin Sum. Cal. Law Sales § 82

[§ 82] Express Warranty.

A disclaimer of an express warranty is essentially contradictory, and an early draft of the Commercial Code rejected such disclaimers. (See *8 U.C.L.A. L. Rev.* 310 [quoting the 1952 Official Text: "If the agreement creates an express warranty, words disclaiming it are inoperative".]) This version could not obtain a consensus, and the text adopted officially and in California provides: "Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this division on parol or extrinsic evidence (Section 2202) negation or limitation is inoperative to the extent that such construction is unreasonable." (U.C.C. 2316(1); see *Hauter v. Zogarts* (1975) 14 C.3d 104, 119, 120 C.R. 681, 534 P.2d 377 [disclaimer gives way to express warranty unless clear agreement between the parties dictates contrary intention]; *Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 C.A.3d 951, 959, 199 C.R. 789 [express warranty in sales brochure describing capabilities of drill rig was not disclaimed by brochure paragraph stating "the only warranty applicable is our standard written warranty"]; cf. *Fogo v. Cutter Laboratories* (1977) 68 C.A.3d 744, 758, 137 C.R. 417 [disclaimer sufficient]; see also 34 *San Diego L. Rev.* 1263, 1359 [disclaimer-of-warranty issues arising from commerce on World Wide Web]; 11 *U.C. Davis L. Rev.* 335 [disclaimer in seed sales]; C.E.B., 1 UCC Sales and Leases, §3.50; 3A Anderson 3d (2002 Rev. ed.), §2-316:102 et seq.; Clark & Smith, *The Law of Product Warranties*, Chap. 8; 17 *A.L.R.3d* 1010, 1073; 54 *A.L.R.3d* 1217 [disclaimer of warranty on new automobile]; 67A *Am.Jur.2d* (2003 ed.), Sales §765.)

In *Appalachian Ins. Co. v. McDonnell Douglas Corp.* (1989) 214 C.A.3d 1, 262 C.R. 716, upholding a disclaimer, the court quoted the Uniform Commercial Code Comment to U.C.C. 2316: "1. This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude 'all warranties, express or implied.' It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise." (214 C.A.3d 34.)

In *Appalachian*, the disclaimer language was not unexpected and the warranty was not a part of the basis of the bargain; hence, the disclaimers were enforceable. (214 C.A.3d 34, 35.)

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2. Warranty of Title and Against Infringement.

4 Witkin Sum. Cal. Law Sales § 83

[§ 83] Warranty of Title and Against Infringement.

(1) *Title*. The former implied warranty of title was omitted from the "implied" classification by the drafters of the Code, in order to remove this warranty from the general disclaimer provisions applicable to implied warranties (see *infra*, §84 et seq.). (U.C.C. 2312, Official Comment 6; see 8 *U.C.L.A. L. Rev.* 309.)

The warranty can be excluded or modified only as provided in U.C.C. 2312(2), which requires "specific language" or "circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have." (See U.C.C. 2312, Official Comment 5 [warranty excluded where seller is sheriff, executor, foreclosing lienor, or person similarly situated]; cf. former C.C. 1733(4) [similar]; and see 8 *U.C.L.A. L. Rev.* 318; C.E.B., 1 UCC Sales and Leases, §3.65 et seq.)

(2) *Against Infringement*. The parties may, by agreement, exclude the warranty against infringement. (See U.C.C. 2312(3); 18 Am.Jur. Legal Forms 2d (1999 ed.), §§253:554, 253:555.)

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aa. In General.

4 Witkin Sum. Cal. Law Sales § 84

[§ 84] In General.

Implied warranties may be excluded "only by conspicuous language or other circumstances which protect the buyer from surprise." (U.C.C. 2316, Official Comment 1; see *Dorman v. International Harvester Co.* (1975) 46 C.A.3d 11, 120 C.R. 516, *infra*, §85; 76 Harv. L. Rev. 1481; 77 Harv. L. Rev. 318; 8 U.C.L.A. L. Rev. 314; Clark & Smith, The Law of Product Warranties, Chap. 8; 67A Am.Jur.2d (2003 ed.), Sales §768 et seq.; on disclaimer of warranties by financing lessor in lease of goods, and remedy of lessee against supplier or manufacturer, see *United States Roofing v. Credit Alliance Corp.* (1991) 228 C.A.3d 1431, 1448, 1450, 279 C.R. 553; for disclaimer forms, see C.E.B., 1 UCC Sales and Leases, §3.62 et seq.)

Disclaimer of implied warranties was an issue in a number of pre-Code cases. (See *Burr v. Sherwin Williams Co.* (1954) 42 C.2d 682, 693, 695, 268 P.2d 1041, *infra*, §88 [printed disclaimer on container was insufficient to exclude implied warranty of merchantability]; *Couts v. Sperry Flour Co.* (1927) 85 C.A. 156, 160, 259 P. 108 [seller's express refusal to warrant seed left "no room for any question of an implied warranty in connection with the sale"]; *The William A. Davis Co. v. Bertrand Seed Co.* (1928) 94 C.A. 281, 284, 271 P. 123 [printed disclaimer on seller's letterheads was sufficient to exclude warranties]; *Sutter v. Associated Seed Growers* (1939) 31 C.A.2d 543, 547, 88 P.2d 144 [crossing out of germination guarantee in original printed contract form before signing was effective as exclusion]; *Buckley v. Shell Chemical Co.* (1939) 32 C.A.2d 209, 213, 89 P.2d 453 [printed disclaimer on order form held effective]; cf. *India Paint & Lacquer Co. v. United Steel Products Corp.* (1954) 123 C.A.2d 597, 605, 606, 267 P.2d 408 [informal invoice containing no complete contractual terms held not an integration, and parol evidence of antecedent warranties admitted despite disclaimer]; and see 43 Cal. L. Rev. 835.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Brittalia Ventures v. Stuke Nursery Co.* (2007) 153 C.A.4th 17, 24, 62 C.R.3d 467 [in action by buyer of walnut trees against seller, jury's implied finding that contract between parties did not exclude warranties and establish "as-is" sale was supported by substantial evidence; earlier documents relating to cancelled transaction had contained warranty exclusion but jury could reasonably find that these were not contract documents at issue].



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 - bb. Conspicuous Language Requirement.

4 Witkin Sum. Cal. Law Sales § 85

[§ 85] Conspicuous Language Requirement.

The requirement of "conspicuous language" was examined in *Dorman v. International Harvester Co. (1975) 46 C.A.3d 11, 120 C.R. 516*, and the disclaimer was held ineffective in this and other respects. Plaintiff purchased a tractor and backhoe from defendant. It proved defective from the outset, and an action was brought for damages for breach of the warranties of merchantability and fitness for particular purpose. The contract form contained the following statement under the heading "Terms of Payment": "The equipment covered hereby is sold subject only to the applicable manufacturer's standard printed warranty, if any, in effect at the date hereof, receipt of a copy of which is hereby acknowledged, and no other warranties, express or implied, including without limitation, the implied warranties of *merchantability and fitness for a particular purpose shall apply.*" *Held*, reversing the trial court, the disclaimer was ineffective.

(a) *Meaning and purpose of statutory requirement.* U.C.C. 1201(10) defines the term "conspicuous" as "so written that a reasonable person against whom it is to operate ought to have noticed it," and adds that a printed *heading* in capitals is conspicuous, while language in the *body* is conspicuous if it is in large or other contrasting type or color. The Official Comment to U.C.C. 2316 states: "This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude 'all warranties, express or implied.' It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise." The court adds: "In other words, section 2316 seeks to protect the buyer from the situation where the salesman's 'pitch,' advertising brochures, or large print in the contract, giveth, and the disclaimer clause--in fine print--taketh away." (46 C.A.3d 18.)

(b) *Disclaimer not conspicuous.* The disclaimer provision here was printed in slightly larger typeface than was the preceding paragraph, but this factor was not enough to overcome the other defects: (a) It was not in boldface or other large size type. (b) The implied warranties in the disclaimer provision were emphasized by italics. (c) There was no adequate heading, such as "DISCLAIMER OF WARRANTIES." (46 C.A.3d 18, 19.)

(c) *Strict construction.* The attempted disclaimer was also ineffective, under the strict construction approach (infra, §91), because the italicizing of the reference to the implied warranties could have lulled the buyer into a sense of security, contrary to the intent of the provision. (46 C.A.3d 19.)

(d) *Disclaimer not bargained for.* A disclaimer of warranty must be bargained for, and is ineffective if given to the buyer after the contract is signed. Here, the manufacturer's standard printed warranty, with its exclusion of implied warranties, was not in the contract form, but in a separate document not shown to have been signed by the buyer or delivered to him. (46 C.A.3d 19, 20.)

The opinion concludes with a quotation from a Washington case: "The purported disclaimers of warranty in the conditional sale contract form and the waiver of warranty in the purchase order form highlight the absurdity of a rule of law which elevates these bland and substantially meaningless terms and conditions above the individually and expressly negotiated terms and conditions, and gives them controlling effect over specifically agreed upon items and conditions of the contract. To adhere to such a rule means that the law presumes that the buyer of a brand new automobile intends to nullify in general all of the things for which he has specifically bargained and will pay. We would presume the buyer does just the opposite." (46 C.A.3d 20.) (See 67A Am.Jur.2d (2003 ed.), Sales §781 et seq.; for examples of forms meeting the conspicuousness requirement, see C.E.B., 1 UCC Sales and Leases, §3.62 et seq.)

Disclaimers of implied warranties arising under the Song-Beverly Consumer Warranty Act (C.C. 1790 et seq.) are governed by the provisions of that Act. (See infra, §90.)

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U.C.C. 1201(10), defining "conspicuous," was amended in 2006 to add the words "displayed, or presented" after "so written."



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cc. "As Is" Sale.

4 Witkin Sum. Cal. Law Sales § 86

[§ 86] "As Is" Sale.

All implied warranties may be excluded by a disclaimer in language that "in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty." Examples of sufficient language are "as is," "as they stand" and "with all faults." (U.C.C. 2316(3)(a), and Official Comment 7; see *Triple C. Leasing v. All-Amer. Mobile Wash* (1976) 64 C.A.3d 244, 250, 134 C.R. 328 [provision in lease-purchase agreement stating that equipment was being received by lessees "as is" precluded any liability of lessor arising out of equipment's unfitness]; 3A Anderson 3d (2002 Rev. ed.), §2-316:156 et seq.; C.E.B., 1 UCC Sales and Leases, §§3.56, 3.63; 20 *San Diego L. Rev.* 399 [congressional rejection of proposed FTC Used Car Rule which would have required informational stickers on windows of cars]; 8 *U.C.L.A. L. Rev.* 316; 24 *A.L.R.3d* 465 [construction and effect of "as is" provision]; 47 *A.L.R.5th* 677, 737 [sale of used motor vehicle]; on similar pre-Code law, see *Intrastate Credit Service v. Pervo Paint Co.* (1965) 236 C.A.2d 547, 552, 46 C.R. 182; on sale of used vehicle to another dealer, see *infra*, §87.)

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dd. Sale of Used Vehicle to Dealer.

4 Witkin Sum. Cal. Law Sales § 87

[§ 87] Sale of Used Vehicle to Dealer.

Veh.C. 24007 provides that a person with a retail seller's permit must not sell a new or used vehicle without inspecting it and remedying defects. However, several exceptions are provided, including one for sale to another dealer.

The sale-to-dealer exception was involved in *Fruehauf Corp. v. Lakeside Chevrolet Co. (1981) 117 C.A.3d 783, 173 C.R. 55*. Dealer Lakeside took trailers as trade-ins and sold them to dealer Fruehauf on a wholesale basis, "as is." Plaintiffs alleged that they were injured when their automobile was struck by one of these trailers, which had become detached from its towing vehicle because of improper safety chains. The issue was whether dealer Lakeside could be held liable for failure to inspect or repair the trailer prior to its bulk sale to Fruehauf. *Held*, there was no such liability. Both U.C.C. 2316(3)(a) and *Veh.C. 24007* protect the dealer seller of used cars to a dealer buyer, from liability to the immediate buyer or any ultimate consumer, regardless of whether the theory of the complaint is negligence, breach of implied warranty, or strict liability. (*117 C.A.3d 787, 789.*)

Interpreting the *Veh.C. 24007* exceptions for the first time, the court said: "[T]he Legislature intended to exempt transactions which involve no danger to the consuming public. If a vehicle is sold for the purpose of being wrecked or dismantled, or sold exclusively for off-highway use, the public is not endangered by the failure of the seller to inspect for and repair any defects. Likewise, if a vehicle is sold to another dealer, no such danger exists because that dealer is bound by the provisions of *Vehicle Code section 24007*. Before that purchasing dealer may sell the vehicle to a consumer, he must bring the vehicle into compliance with the provisions of the Vehicle Code by inspecting for and remedying any dangerous defects." (*117 C.A.3d 786.*) Hence: "We believe that exemption reflects a legislative determination that, when a vehicle is sold to a dealer, all liability to the consuming public is shifted from that seller to that buying dealer." (*117 C.A.3d 788.*) (See *Martinez v. Enterprise Rent-A-Car Co. (2004) 119 C.A.4th 46, 58, 13 C.R.3d 857* [where defendant car rental company, a licensed dealer, sold damaged car to another dealer, and dealer sold car to consumer, summary judgment in favor of defendant was proper in consumer's action alleging defendant failed to obtain total loss salvage certificate before selling car; *Veh.C. 24007* shifted liability for any Vehicle Code requirement, including title disclosures, to dealer who sold car to consumer].)

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ee. Warranty of Fitness for Particular Purpose.

4 Witkin Sum. Cal. Law Sales § 88

[§ 88] Warranty of Fitness for Particular Purpose.

The warranty of fitness for a particular purpose may be disclaimed in general language. The Code cites as a sufficient disclaimer: "There are no warranties which extend beyond the description on the face hereof." (U.C.C. 2316(2), and see Official Comment 4; see also 3A Anderson 3d (2002 Rev. ed.), §§2-316:116, 2-316:188; C.E.B., 1 UCC Sales and Leases, §3.55.) The disclaimer may only be by a *writing* and must be *conspicuous*. (U.C.C. 2316(2); see U.C.C. 1201(10), *supra*, §85; *Dorman v. International Harvester Co.* (1975) 46 C.A.3d 11, 120 C.R. 516, *supra*, §85; 73 A.L.R.3d 248.)

In *Burr v. Sherwin Williams Co.* (1954) 42 C.2d 682, 268 P.2d 1041, decided under the former Sales Act, a drum of insecticide carried the label: "Seller makes no warranty of any kind, express or implied, concerning the use of this product. Buyer assumes all risk in use or handling, whether in accordance with directions or not." *Held*, this was effective to exclude the implied warranty of fitness; the notice of disclaimer can be conveyed to the buyer not only by formal contract provision but by printed notices on letterheads, labels, and the like, provided that the notice is given before the bargain is complete. (42 C.2d 693.)

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ff. Warranty of Merchantability.

4 Witkin Sum. Cal. Law Sales § 89

[§ 89] Warranty of Merchantability.

The warranty of merchantability may not be disclaimed in general language, except in "as is" sales (see *supra*, §86). A sufficient disclaimer "must mention merchantability." (See U.C.C. 2316(2), and Official Comment 3.) The disclaimer may be oral, but, if it is in writing, it must be conspicuous. (U.C.C. 2316(2); see U.C.C. 1201(10), *supra*, §85; *Hauter v. Zogarts* (1975) 14 C.3d 104, 118, 120 C.R. 681, 534 P.2d 377, *supra*, §71 [drawing in instructions accompanying golf training device and showing proper way to use device was insufficient to limit implied warranty of merchantability]; *Dorman v. International Harvester Co.* (1975) 46 C.A.3d 11, 120 C.R. 516, *supra*, §85; 3A Anderson 3d (2002 Rev. ed.), §2-316:112 et seq.; C.E.B., 1 UCC Sales and Leases, §3.53; 8 U.C.L.A. L. Rev. 315; on pre-Code law, see *Burr v. Sherwin Williams Co.* (1954) 42 C.2d 682, 695, 268 P.2d 1041, *supra*, §88; *Klein v. Asgrow Seed Co.* (1966) 246 C.A.2d 87, 98, 54 C.R. 609.)

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4. Consumer Warranties.

4 Witkin Sum. Cal. Law Sales § 90

[§ 90] Consumer Warranties.

Under the Consumer Warranty Act (supra, §52 and infra, §314 et seq.), implied warranties of merchantability and fitness may be "waived" only where the sale is "as is" or "with all faults." (C.C. 1792.3, 1792.5; see *4 Pacific L. J.* 202; for comprehensive discussion of disclaimers in consumer sales generally, see *77 Harv. L. Rev.* 318.) And a manufacturer, distributor, or retailer who makes express warranties "may not limit, modify, or disclaim" the implied warranties that arise under the Act. (C.C. 1793.)

The waiver must be contained in a conspicuous writing attached to the goods and must clearly inform the buyer, prior to the sale, that: (1) the goods are offered on an "as is" or "with all faults" basis; (2) the buyer bears the entire risk of the quality and performance of the goods; and (3) the buyer assumes the entire cost of all necessary servicing or repair for defects. (C.C. 1792.4(a).) For catalog sales, the required writing must be stated for each item in the catalog offering the goods. (C.C. 1792.4(b).) (See C.E.B., 1 UCC Sales and Leases, §3.60.)

The implied and express warranties with respect to assistive devices provided by C.C. 1792.2(b) and 1793.02(a) may not be waived under C.C. 1792.3. (C.C. 1793.02(f); see supra, §§56, 72.)

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5. Insufficient or Invalid Disclaimers.

aa. Strict Construction.

4 Witkin Sum. Cal. Law Sales § 91

[§ 91] Strict Construction.

Warranty disclaimers are strictly construed against the seller. (*Burr v. Sherwin Williams Co. (1954) 42 C.2d 682, 694, 268 P.2d 1041*; *Hauter v. Zogarts (1975) 14 C.3d 104, 119, 120 C.R. 681, 534 P.2d 377*; *Dorman v. International Harvester Co. (1975) 46 C.A.3d 11, 19, 120 C.R. 516, supra, §85*; cf. *A & M Produce Co. v. FMC Corp. (1982) 135 C.A.3d 473, 484, 186 C.R. 114, 1 Summary (10th), Contracts, §§322, 332* [disclaimer provision may be held "unconscionable" under C.C. 1670.5, and consequently unenforceable]; see *8 U.C.L.A. L. Rev. 311*; *38 A.L.R.4th 25* [unconscionable warranty disclaimer].) The following cases, decided before the adoption of the Commercial Code, illustrate this principle:

(1) *Disclaimer of Express but Not Implied Warranties.* In *United States Credit Bureau v. Powell (1953) 121 C.A.2d Supp. 870, 264 P.2d 229*, the clause stated that "This contract constitutes the entire agreement, no waivers or modifications shall be valid unless written upon or attached hereto." *Held*, this would preclude parol evidence of an express warranty but it did not exclude implied warranties, which are part of the contract unless *specifically excluded*. (*121 C.A.2d Supp. 871.*)

(2) *Disclaimer of Only One Implied Warranty.* In *Burr v. Sherwin Williams Co., supra*, insecticide was sold contaminated with a weed killer. The exculpatory clause stated that there was no warranty concerning the "use" of the product, and this, the court said, excluded any warranty that goods of this description were effective or safe as an insecticide. (See discussion of this point, *supra*, §88.) But liability for breach of warranty of merchantability was nevertheless upheld: "The language does not purport to disclaim the implied warranty that the substance in the drums actually meets the description of the product ordered by plaintiffs so as to be generally salable in the same manner as other products of the type described. More specifically, there is nothing in the disclaimer which suggests that Sherwin Williams was refusing to warrant that the liquid in the drums was compounded so as to conform with the description and was free from any impurity which would make it unsalable for the general purposes of a product of the kind ordered by plaintiffs." (*42 C.2d 695.*) (See also *Klein v. Asgrow Seed Co. (1966) 246 C.A.2d 87, 98, 54 C.R. 609, infra, §94*; on the Code's stricter requirements for disclaimer of merchantability, see *supra*, §89.)

(3) *Ambiguous or Conflicting Provisions.* In *Lindberg v. Coutches* (1959) 167 C.A.2d Supp. 828, 334 P.2d 701, a secondhand airplane was sold with the printed contract provision "as is, where is, unless otherwise specified." A handwritten addition read "Deposit subject to financial approval and mechanical approval." Held, the "mechanical approval" condition came within the phrase "unless otherwise specified," and modified the disclaimer so as not to eliminate the warranty of mechanical fitness. (167 C.A.2d Supp. 833.) (See also *Gottsdanker v. Cutter Laboratories* (1960) 182 C.A.2d 602, 611, 6 C.R. 320; *Guntert & Zimmerman, Sales Div. v. Thermoid Co.* (1963) 216 C.A.2d 771, 777, 31 C.R. 99, *infra*, §93.)

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d. Disclaimer.

5. Insufficient or Invalid Disclaimers.

bb. Illegal Disclaimer.

4 *Witkin Sum. Cal. Law Sales* § 92

[§ 92] Illegal Disclaimer.

(1) *New Automobile Warranty*. In the celebrated case of *Henningsen v. Bloomfield Motors* (1960) 32 N.J. 358, 161 A.2d 69, the disclaimers in the American Manufacturers Association standard form sales contract were held ineffective to protect the manufacturer and dealer from liability for damages resulting from a defect in a new automobile. The *Henningsen* case was followed in *Rose v. Chrysler Motors Corp.* (1963) 212 C.A.2d 755, 759, 28 C.R. 185, *infra*, §205. (See 48 Cal. L. Rev. 880; 70 Harv. L. Rev. 630; 77 Harv. L. Rev. 318; 13 Hastings L. J. 73; 8 U.C.L.A. L. Rev. 661; 54 A.L.R.3d 1217 [validity of warranty disclaimer in new automobile sale].)

(2) *Consumer Warranty*. A waiver of implied warranties arising under the Consumer Warranty Act must strictly comply with the provisions of the Act. (C.C. 1792.3; see *supra*, §90.) Any attempted waiver that does not meet these requirements "shall be deemed contrary to public policy and shall be unenforceable and void." (C.C. 1790.1.)

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cc. General Disclaimer Followed by Express Warranty.

4 Witkin Sum. Cal. Law Sales § 93

[§ 93] General Disclaimer Followed by Express Warranty.

In *Guntert & Zimmerman, Sales Div. v. Thermoid Co.* (1963) 216 C.A.2d 771, 31 C.R. 99, defendant T was the manufacturer of wire braid steam hose purchased for use in plaintiffs' olive processing plant. The hose was sold to plaintiffs by G, a jobber. T's price book contained a general disclaimer of warranty of fitness for use and limitation of damages for defects to the price of the item. However, T's agent, brought into the negotiations by G, represented to plaintiffs that the hose was proper for the intended use, and plaintiffs bought it in reliance on this representation. *Held*, this representation was an express warranty, and T was liable, on two theories: (1) In a price book sale by the manufacturer to a jobber, a broad disclaimer is understandable, since the manufacturer cannot know all of the uses to which his product may be put by the ultimate unknown buyer; but this was not such a sale through a jobber; T, the manufacturer, made representations to plaintiffs through his agent, and shipped the goods directly to them. (2) A general disclaimer is ineffective against a subsequent express warranty. (216 C.A.2d 776.)

Defendant T further contended that a printed statement on the invoice--"Goods shipped subject to standard warranty clause contained in contract and acknowledgment"--incorporated the price book warranty. But the court pointed out that there was no evidence of a dealership or agency "contract" or of any "acknowledgment" of disclaimer in the record; and, construing it strictly, this "small print at the bottom of the invoice" was ineffective against the express warranty by T's agent. (216 C.A.2d 777.)

West's Key Number Digest, Sales k.280

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dd. Where Warranty Is Fraudulent.

4 Witkin Sum. Cal. Law Sales § 94

[§ 94] Where Warranty Is Fraudulent.

In *Klein v. Asgrow Seed Co.* (1966) 246 C.A.2d 87, 54 C.R. 609, Asgrow produced seed of a new variety of early-maturing cannery tomato, known as VF-36. After discovery of contamination with an unknown percentage of "rogues" (off-type seed), it nevertheless marketed the seed in sealed cans labeled "VF-36," with no warnings. A quantity was sold to L, a broker, who sold to Ranch Supply, which sold to Associated Farm, which sold to plaintiff tomato growers. Plaintiffs' crop consisted of 50-70% late-maturing tomatoes, which made harvesting difficult and caused a loss of about half the normal crop. *Held*, all of the sellers were liable for damages and Asgrow was liable to L on his cross-complaint.

Asgrow relied mainly on its disclaimer, stated on every can of seed following the warranty of description, and on its invoices, purporting to limit its liability to the price of the seed. As to all of the buyers except L, it was established that none of them saw the cans or the invoices until after purchasing, and the disclaimer was held to be an ineffectual attempt to add a contractual term not brought to the attention of the other party. (246 C.A.2d 97; see 1 *Summary* (10th), *Contracts*, §121.) L, the seed broker and first buyer, was aware of the Asgrow disclaimers, by reason of prior dealings, and an honest disclaimer would have been binding on him. (246 C.A.2d 99.) But here Asgrow deliberately sold the seed under an express warranty known to be false, and it was unenforceable for two reasons: (1) The buyer's agreement is only to an honest disclaimer; and (2) a disclaimer of liability for a fraudulent warranty is illegal under C.C. 1668 (see 1 *Summary* (10th), *Contracts*, §660). (246 C.A.2d 100.)

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5. Cumulation and Conflict.

a. Rule of Construction.

4 *Witkin Sum. Cal. Law Sales* § 95

[§ 95] Rule of Construction.

All warranties, express and implied, must be construed as cumulative and consistent if such construction is reasonable. (U.C.C. 2317, and see Official Comment 1; 3A Anderson 3d (2002 Rev. ed.), §2-317:5.)

In *Gottsdanker v. Cutter Laboratories* (1960) 182 C.A.2d 602, 6 C.R. 320, *infra*, §113, decided under pre-Code law, defendant manufacturer contended that the printed "directions" accompanying its boxes of polio vaccine constituted an express warranty negating implied warranties. The court said: "We find nothing in the 'directions' inconsistent with the implied warranties of fitness and merchantability. The bulk of the printed material deals with the lack of preservatives in the vaccine, dosage, and means of administration, none of which in any way relate to the facts in issue in this case." (182 C.A.2d 610.) (See *North Alaska Salmon Co. v. Hobbs, Wall & Co.* (1911) 159 C. 380, 391, 113 P. 870, 120 P. 27; *Inner Shoe Tire Co. v. Tondro* (1927) 83 C.A. 689, 695, 257 P. 211.)

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5. Cumulation and Conflict.

b. Priorities Among Conflicting Warranties.

4 Witkin Sum. Cal. Law Sales § 96

[§ 96] Priorities Among Conflicting Warranties.

Where warranties cannot be construed as consistent, "the intention of the parties shall determine which warranty is dominant." (U.C.C. 2317; see 3A Anderson 3d (2002 Rev. ed.), §2-317:6; C.E.B., 1 UCC Sales and Leases, §§3.71, 3.72; 8 *U.C.L.A. L. Rev.* 319; but see Official Comment 2 [seller who has not acted in good faith may be estopped from claiming inconsistency].)

The Code sets forth rules for determining intent:

(1) "Exact or technical specifications displace an inconsistent sample or model or general language of description." (U.C.C. 2317(a).)

(2) "A sample from an existing bulk displaces inconsistent general language of description." (U.C.C. 2317(b); see C.E.B., 1 UCC Sales and Leases, §3.71.)

(3) "Express warranties displaced ... inconsistent implied warranties other than an implied warranty of fitness for a particular purpose." (U.C.C. 2317(c); see U.C.C. 2315, Official Comment 2; 3A Anderson 3d (2002 Rev. ed.), §2-317:12 et seq.; C.E.B., 1 UCC Sales and Leases, §3.71; 8 *U.C.L.A. L. Rev.* 321; for pre-Code law not excepting the warranty of fitness, see *El Zarape Tortilla Factory v. Plant Food Corp.* (1949) 90 *C.A.2d* 336, 347, 203 *P.2d* 13 [express warranty that goods were "No. 2 white corn--bulk" displaced implied warranty of fitness since such bulk corn is not fit for human consumption].)

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(3) *Displacement by express warranties:* See *Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 *C.A.4th* 937, 948, 56 *C.R.3d* 177, 5 *Summary* (10th), *Torts*, Supp., §118 [even if specifications provided by plaintiff buyer to defendant manufacturer constituted express warranty, they did not displace implied warranty of merchantability because specifications and implied warranty could reasonably be construed as consistent and cumulative].



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6. Privity.

a. Traditional Rule.

4 Witkin Sum. Cal. Law Sales § 97

[§ 97] Traditional Rule.

Privity of contract between the plaintiff and defendant is ordinarily essential to recovery in actions for breach of warranty. The reason is that a warranty is considered contractual in its nature, and is a part of the contract of sale. Such privity is present in the usual case where the buyer sues the seller. But where someone other than the buyer sues, or someone other than the seller is the defendant, problems of lack of privity arise. Thus, (1) if the buyer transfers the goods to another, or originally bought them for a third party, the third party cannot sue the seller; the warranty only extends to the immediate buyer. And, (2) if the goods were originally produced by a manufacturer or wholesaler, and the plaintiff buys from a retail dealer, but seeks to hold the manufacturer or wholesaler liable for breach of warranty, again there is no privity of contract, and no action for breach of warranty. (See *Burr v. Sherwin Williams Co. (1954) 42 C.2d 682, 695, 268 P.2d 1041* [suit against manufacturer; "privity of contract is required in an action for breach of either express or implied warranty"]; *Collum v. Pope & Talbot (1955) 135 C.A.2d 653, 656, 288 P.2d 75*; 2 American Law of Products Liability 3d, §21:1 et seq.; 10 *Hastings L. J.* 418; 23 *So. Cal. L. Rev.* 287; 8 *U.C.L.A. L. Rev.* 322 [discussing concepts of "horizontal" and "vertical" privity]; 75 *A.L.R.2d* 39 [privity requirement in action for injury to person or property against manufacturer or seller]; 16 *A.L.R.3d* 683 [privity requirement in action against remote manufacturer or distributor where no injury to person or property alleged].)

The requirement is only that there be privity of contract; direct communication of the warranty to the buyer is not essential. A plaintiff, e.g., may have a tort action for deceit where false representations are intended for him or her though communicated to another. (See 5 *Summary* (10th), *Torts*, §804.) And the same is true of a warranty. Thus, in *Odell v. Frueh (1956) 146 C.A.2d 504, 304 P.2d 45*, defendant seller made representations about the product to architects, who thereupon specified it for a building, and plaintiff contractors purchased it from defendant and used it. *Held*, plaintiffs could recover for breach of warranty. (146 *C.A.2d* 508.) (Cf. *Collum v. Pope & Talbot, supra*, 135 *C.A.2d* 655 [intent to make representations only to immediate buyer, not plaintiff].)

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6. Privity.

b. Modern View.

4 Witkin Sum. Cal. Law Sales § 98

[§ 98] Modern View.

(1) *In General.* The privity requirement has been strongly attacked, and a legislative and judicial trend away from it is apparent. (See 2 American Law of Products Liability 3d, §21:1 et seq.; 44 A.L.R.3d 473 [action by third party based on "rescue doctrine"]; C.E.B., 1 UCC Sales and Leases, §3.121.) Moreover, the concept has been virtually abandoned in food and drug cases. (See *infra*, §§112, 113.) And its importance has been further diminished by the development of the theory of strict liability in tort for injuries resulting from defective products. Lack of privity is not a defense in such actions. (See 6 *Summary* (10th), *Torts*, §1428 et seq.)

(2) *Uniform Commercial Code.* The earlier versions of the Official Text eliminated the requirement of privity only as to the buyer's family, household, or guests to the extent that it was reasonable to expect that they might use, consume, or be affected by the goods. The provision was called a "step backward" from California case law and was not enacted by the state Legislature. (See 1B U.L.A. (Master Ed.), §2-318; 8 U.C.L.A. L. Rev. 326 [criticizing provision and anticipating its rejection in California]; see also 3A Anderson 3d (2002 Rev. ed.), §2-318:1 [Alternatives A, B, and C promulgated by Code drafters to encourage some uniformity among the states]; 20 *Pepperdine L. Rev.* 1215 [An Analysis of Warranty Claims Instituted by Non-Privity Plaintiffs in Jurisdictions That Have Adopted *Uniform Commercial Code Section 2-318* (Alternative A)]; 50 A.L.R.5th 327 [cases decided under all three alternatives]; 67A *Am.Jur.2d* (2003 ed.), *Sales* §644 et seq.)

(3) *Consumer Warranty Act.* The Consumer Warranty Act (C.C. 1790 et seq.; see *supra*, §52) eliminates the requirement of privity between the buyer and the manufacturer or distributor, by implying warranties in retail sales of consumer goods unless disclaimed. (See C.C. 1792 [manufacturer's and retail seller's warranty of merchantability], C.C. 1792.1 [manufacturer's warranty of fitness], C.C. 1792.2 [retailer's or distributor's warranty of fitness]; 4 *Pacific L. J.* 202.) However, the Act does not extend to nonbuyer users of consumer goods. (See C.C. 1791.1(d) [providing remedy for breach of warranty to "buyer" of defective goods]; C.C. 1791(b) [defining "buyer"].)

(4) *Recent Cases.* The California courts, while acknowledging the existence of exceptions (see *infra*, §99 et seq.), continue to apply the traditional rule in most circumstances. (See *Evraets v. Intermedics Intraocular* (1994) 29 C.A.4th 779, 788, 34 C.R. 852, 6 *Summary* (10th), *Torts*, §1540 [action by buyer of intraocular lens against manufacturer and distributor for breach of implied warranty of fitness for buyer's use was precluded by lack of privity; buyer had relied on

physician's skill or judgment to select or furnish suitable product]; *Fieldstone Co. v. Briggs Plumbing Products* (1997) 54 C.A.4th 357, 371, 62 C.R.2d 701, 6 Summary (10th), Torts, §1515 [developer's implied warranty claim against manufacturers for defective sinks was precluded by lack of privity, where developer conceded that it did not contract with manufacturers].)

In *All West Electronics v. M-B-W* (1998) 64 C.A.4th 717, 75 C.R.2d 509, plaintiff lease-purchaser of a paver brought an action for breach of implied warranty against defendant manufacturer of the paver. The trial judge granted defendant's motion for directed verdict on the ground that defendant was not a party to the lease and there was no evidence that defendant or its agent had negotiated the sale to plaintiff. *Held*, affirmed. The contractual privity requirement set out in *Burr v. Sherwin Williams Co.* (1954) 42 C.2d 682, 268 P.2d 1041, *supra*, §97, was not eroded by *United States Roofing v. Credit Alliance Corp.* (1991) 228 C.A.3d 1431, 279 C.R. 533. In that case, the privity requirement was held to be no obstacle to the implied warranty claim by the lease-purchaser of a crane against the company that had supplied the crane to the lessor. That holding was proper because the lease-purchaser and supplier had engaged in direct dealings with each other. (64 C.A.4th 718, 726.)

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(4) *Recent Cases.* See *Blanco v. Baxter Healthcare Corp.* (2008) 158 C.A.4th 1039, 1057, 70 C.R.3d 566 [because of lack of privity, family of patient who died after defendant manufacturer's bileaflet mitral valve was installed in patient failed to state cause of action for breach of implied warranties of merchantability and fitness for particular purpose; evidence was that patient relied on judgment of her physician, rather than that of defendant, that valve was appropriate for her].



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c. Exceptions.

1. Manufacturer's Express Warranty.

4 *Witkin Sum. Cal. Law Sales* § 99

[§ 99] Manufacturer's Express Warranty.

(1) *Sale of Goods*. An express warranty may sometimes be made by a manufacturer directly to the buyer, although the goods are actually sold by someone other than the manufacturer. Thus, in *Southern Calif. Enterprises v. D.N. & E. Walter & Co.* (1947) 78 C.A.2d 750, 178 P.2d 785, plaintiff buyer wanted a carpet, and, by agreement with defendant manufacturer, the latter fabricated, assembled, and furnished it to F, who sold it to plaintiff. *Held*, plaintiff buyer could recover from defendant manufacturer for breach of an express warranty made directly by defendant to plaintiff. The court observed that there was no implication in the Sales Act "that an express warranty by a manufacturer of merchandise to a user on condition that he purchase the manufacturer's goods from an intermediate party is not valid." (78 C.A.2d 760.) (See *Seely v. White Motor Co.* (1965) 63 C.2d 9, 14, 45 C.R. 17, 403 P.2d 145, *infra*, §204; *Hayman v. Shoemake* (1962) 203 C.A.2d 140, 154, 21 C.R. 519; on strict tort liability, see 6 *Summary* (10th), *Torts*, §1428 et seq.)

A more far-reaching exception was declared in *Free v. Sluss* (1948) 87 C.A.2d Supp. 933, 197 P.2d 854, holding a manufacturer liable to plaintiff, a groceryman, who bought 100 cases of soap from a dealer. The court said: "As to the manufacturer we have concluded that the 'guarantee of quality' printed upon each package of soap reached beyond the dealers to persons in the position of plaintiffs. It establishes the manufacturer's knowledge and intention that the goods should move through the usual channels of trade, and was a representation addressed to those who would deal in its product. It was under no obligation to make the guarantee, but having made it, it does not lie in its mouth to repudiate it when the condition of complete unsuitability for the market brings the guarantee into play." (87 C.A.2d Supp. 936.)

The foregoing case and similar decisions from other jurisdictions were noticed in *Burr v. Sherwin Williams Co.* (1954) 42 C.2d 682, 696, 268 P.2d 1041, as follows: "Another possible exception to the general rule is found in a few cases where the purchaser of a product relied on representations made by the manufacturer in labels or advertising material, and recovery from the manufacturer was allowed on the theory of express warranty without a showing of privity." (See also *Rodrigues v. Campbell Industries* (1978) 87 C.A.3d 494, 500, 151 C.R. 90 ["privity is not a requirement for actions based upon an express warranty"]; *Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 C.A.3d 951, 957, 199 C.R. 789; 75 A.L.R.2d 112 [statements in advertising as affecting manufacturer's or seller's liability]; *supra*, §60.)

However, in *Collum v. Pope & Talbot* (1955) 135 C.A.2d 653, 288 P.2d 75, the exception was held inapplicable to defendant lumber mill operator who sold a Douglas fir joist, grade No. 1, to C, a lumber dealer, who resold it to plaintiffs' employer, a building contractor. In plaintiffs' personal injury action brought after breaking of the joist, the court found the following factors preclusive of the warranty: (a) The quality was determinable by visual inspection, and all parties were equally capable of making it; (b) plaintiffs were themselves manufacturers in the sense that they cut and fitted the joist, and in the process materially changed its condition by notches and hammer blows to force it into place; (c) defendant, cutting logs into boards, was not engaged in "manufacturing" within the meaning of the term as used in the cases declaring this exception to the privity requirement. (135 C.A.2d 656.)

(2) *Contract for Labor and Materials*. A similar exception was applied and an "indirect" warranty found in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Cavanaugh* (1963) 217 C.A.2d 492, 32 C.R. 144. The agreement, to install a radiant heating system, was held to be a contract for labor and material, not a sale. However, independently of the law of sales, an express warranty may give rise to liability, and such a warranty was given: Defendant manufacturer represented to plaintiff's engineer, by brochures and otherwise, that its product--plastic pipe tubing--was suitable for use in the heating system in lieu of copper pipe. As to lack of privity (representations made to the engineer, not directly to plaintiff), the court said that the warranty was indirectly made to plaintiff for his action was induced by it:

"The defendant ... by means of its representations hit the ultimate target at which it had aimed. That being the case, the concept of privity should not be so narrowly construed that that defendant is thereby insulated from responsibility for damage caused to the plaintiff by the inaccuracy of any representation made by it which was in the nature of a warranty." (217 C.A.2d 513.)

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2. Seed Grower's Express Warranty.

4 Witkin Sum. Cal. Law Sales § 100

[§ 100] Seed Grower's Express Warranty.

The express warranty of a commercial seed grower, like that of a manufacturer, runs to all the intermediate merchants and the ultimate buyer who uses the seed. (*Klein v. Asgrow Seed Co. (1966) 246 C.A.2d 87, 101, 54 C.R. 609, supra, §94* [description on cans in which seed was sold]; on warranties in the sales of seeds and nursery stock generally, see *67A Am.Jur.2d (2003 ed.), Sales §1222.*)

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3. Dangerous Instrumentality.

4 Witkin Sum. Cal. Law Sales § 101

[§ 101] Dangerous Instrumentality.

(1) *The Henningsen Case*. In 1960, in *Henningsen v. Bloomfield Motors* (1960) 32 N.J. 358, 161 A.2d 69, the wife of the buyer of an automobile was allowed to recover from the manufacturer for breach of the implied warranty of merchantability. This landmark decision has been the subject of much comment. (See 48 Cal. L. Rev. 873; 74 Harv. L. Rev. 630; 13 Hastings L. J. 70; 8 U.C.L.A. L. Rev. 658; 75 A.L.R.2d 39.)

(2) *The Peterson Case: Injury to Employee of Buyer*. The *Henningsen* case, *supra*, rejected the privity requirement on policy grounds. In *Peterson v. Lamb Rubber Co.* (1960) 54 C.2d 339, 5 C.R. 863, 353 P.2d 575, the court took a less radical position, for it found no substantial authority justifying an exception to the requirement in dangerous instrumentality cases. (54 C.2d 345.) Nevertheless, by adopting a new and expanded definition of privity, the opinion eliminates the requirement in cases involving injuries to employees.

The complaint alleged that defendant manufacturer sold to plaintiff's employer a two-inch rubber bonded abrasive wheel for grinding and burring. The wheel contained no markings to identify the manufacturer or to indicate the maximum revolutions per minute for safety. Plaintiff, while operating the wheel, suffered a serious eye injury when the wheel disintegrated. *Held*, reversing judgment on demurrer as to the warranty count, a cause of action was stated: The court found "privity" to exist between the injured employee and the manufacturer of this dangerous instrumentality on two unusual theories:

First, in modern industry employees should be considered members of "the industrial 'family' of the employer ... and to thus stand in such privity to the manufacturer as to permit the employees to be covered by warranties made to the purchaser-employer." (54 C.2d 347.)

Second, the term "privity" has many meanings, and one--based on succession--may be invoked in this situation: "Thus, in the present context, the employee had the successive right to the possession and use of the grinding wheel handed over to him by his purchaser-employer, and, we believe, should fairly be considered to be in privity to the vendor-manufacturer with respect to the implied warranties." (54 C.2d 348.) (See 13 Hastings L. J. 71; 34 So. Cal. L. Rev. 98; 8 U.C.L.A. L. Rev. 233; 2 American Law of Products Liability 3d, §21:19; on strict liability in tort, see 6

Summary (10th), *Torts*, §1428 et seq.)

The *Peterson* case was followed in *Vallis v. Canada Dry Ginger Ale* (1961) 190 C.A.2d 35, 44, 11 C.R. 823, *infra*, §107, where a restaurant employee was injured by an exploding bottle of club soda.

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7. Sale of Food, Beverages, and Drugs.

a. Implied Warranties.

1. Ordinary Warranties Apply.

4 Witkin Sum. Cal. Law Sales § 102

[§ 102] Ordinary Warranties Apply.

Sales of foods and beverages are subject to the same warranties as sales of other goods, and the warranties of merchantability and fitness for a particular purpose apply in proper cases. Where the goods are of defective quality or unfit for consumption, the warranty is breached. (For cases applying the warranties of the Sales Act, see *Klein v. Duchess Sandwich Co.* (1939) 14 C.2d 272, 282, 93 P.2d 799; *Escola v. Coca-Cola Bottling Co. of Fresno* (1944) 24 C.2d 453, 464, 150 P.2d 436; *Whitfield v. Jessup* (1948) 31 C.2d 826, 828, 193 P.2d 1; *Medeiros v. Coca-Cola Bottling Co. of Turlock* (1943) 57 C.A.2d 707, 711, 135 P.2d 676; *Vaccarezza v. Sanguinetti* (1945) 71 C.A.2d 687, 689, 163 P.2d 470; *Kassouf v. Lee Bros.* (1962) 209 C.A.2d 568, 572, 26 C.R. 276; and see generally 9 Cal. L. Rev. 35; 8 U.C.L.A. L. Rev. 300; 96 A.L.R.3d 451 [packer's, foodstore's, or restaurant's liability for causing trichinosis]; 87 A.L.R.4th 804 [spoilage or contamination of beverage]; 90 A.L.R.4th 12 [foreign substance in beverage]; 1 A.L.R.5th 1 [foreign object in food or food product]; 2 A.L.R.5th 1 [spoilage, contamination, or other deleterious condition of food or food product]; 2 A.L.R.5th 189 [presence of object related to, but not intended to be present in, food product]; 47 Proof of Facts 3d 47 [food poisoning]; 2 American Law of Products Liability 3d, §§20:14 et seq., 20:38; on strict tort liability, see 6 *Summary* (10th), *Torts*, §1428 et seq.)

Application of the warranty of fitness for a particular purpose was substantially restricted under the Sales Act, which excluded the warranty where goods were sold under a *patent or trade name*. The Commercial Code does not exclude the warranty in such circumstances. (See *supra*, §76.)

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a. Implied Warranties.

2. Food Sold in Sealed Package.

4 *Witkin Sum. Cal. Law Sales* § 103

[§ 103] Food Sold in Sealed Package.

An exception to the application of implied warranties in the sale of food is recognized by some courts where the goods are sold in a *sealed package*, can, or other container, on the theory that the customer knows as much about the contents as the dealer. But the better authorities and the California decisions make no such distinction and imply the warranty. (*Gindraux v. Maurice Mercantile Co. (1935) 4 C.2d 206, 208, 47 P.2d 708*; see *23 Cal. L. Rev. 532*; *43 Cal. L. Rev. 620*; *8 So. Cal. L. Rev. 620*; *8 U.C.L.A. L. Rev. 301*; *2 American Law of Products Liability 3d, §20:35.*)

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3. Service of Food in Restaurant.

4 *Witkin Sum. Cal. Law Sales* § 104

[§ 104] Service of Food in Restaurant.

A sale is a condition for the existence of a warranty. (See *supra*, §53.) It is clear that this condition is met where food is actually sold (see *supra*, §102); however, where food and beverages are served in a restaurant, it is necessary first to determine whether such "service" constitutes a sale. There was a conflict of authority under the Sales Act, but California treated it as a sale, carrying with it an implied warranty of fitness for human consumption. (*Mix v. Ingersoll Candy Co.* (1936) 6 C.2d 674, 680, 59 P.2d 144, *infra*, §108; *Goetten v. Owl Drug Co.* (1936) 6 C.2d 683, 686, 59 P.2d 142; see 25 Cal. L. Rev. 117; 43 Cal. L. Rev. 622; 10 So. Cal. L. Rev. 188; 23 So. Cal. L. Rev. 289.)

The Commercial Code codifies this rule by providing that "the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale." (U.C.C. 2314(1); see *Evart v. Suli* (1989) 211 C.A.3d 605, 259 C.R. 535, *infra*, §108; *Mexicali Rose v. Superior Court* (1992) 1 C.4th 617, 4 C.R.2d 145, 822 P.2d 1292, *infra*, §108.)

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In *Sarti v. Salt Creek, Ltd.* (2008) 167 C.A.4th 1187, 85 C.R.3d 506, plaintiff became ill after eating raw tuna at a restaurant. In hospital testing, she was found to have campylobacter bacteria in her system, and, in her breach of warranty case, she presented expert testimony indicating that the bacteria could have come from cross-contamination with raw chicken occurring in the restaurant kitchen. The jury found the restaurant liable. The trial judge, however, perceiving that the jury's verdict was based on the inference that certain of the restaurant's practices may have led to cross-contamination, granted the restaurant's motion for judgment notwithstanding the verdict. *Held*, reversed. The trial judge believed that *Minder v. Cielito Lindo Restaurant* (1977) 67 C.A.3d 1003, 136 C.R. 915, imposed a higher standard of causation in food poisoning cases than in other tort and warranty cases. To the extent that *Minder* can be read not to permit the use of reasonable inferences to prove causation, it is wrong. (167 C.A.4th 1202.) The trial judge made clear that he found the jurors' inferences reasonable and, absent *Minder*, he would have voted with them. Thus it was error to grant the motion for judgment notwithstanding the verdict. (167 C.A.4th 1192, 1207.)



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4. Drugs.

4 *Witkin Sum. Cal. Law Sales* § 105

[§ 105] Drugs.

The usual warranties apply in a sale of drugs, but there is no breach if the product is used by a person not reasonably expected to do so, or in a manner contrary to adequate warnings. Thus, where a drug is designed for administration by doctors and is distributed principally to them, sufficient warnings may be found in communications to them; and no additional duty extends to persons suffering from an unusual allergy to a particular drug. (*Magee v. Wyeth Laboratories* (1963) 214 C.A.2d 340, 350, 352, 353, 29 C.R. 322; see BAJI, No. 9.70 [use of product by hypersensitive person]; 24 So. Cal. L. Rev. 221 [contact dermatitis from cosmetics and dyes].) (On strict tort liability, see 6 *Summary* (10th), *Torts*, §1428 et seq.)

There is, however, a duty to exercise reasonable care to warn against the inherent dangers of a product, such as known side effects. (*Love v. Wolf* (1964) 226 C.A.2d 378, 403, 38 C.R. 183; 76 A.L.R.2d 9 [duty to give warning as affecting manufacturer's or seller's liability for product-caused injury].)

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5. Blood and Other Biologics.

4 Witkin Sum. Cal. Law Sales § 106

[§ 106] Blood and Other Biologics.

(1) *Furnishing of Blood Classified as Service.* The term "biologics" is applied to blood and blood derivatives, serum, vaccine, etc. (See *Health & Saf.C. 1600.1.*) One type--blood and blood derivatives--is free from implied warranty because of a legislative declaration that its procurement, processing, distribution, or use is a *service* and not a sale. (*Health & Saf.C. 1606*; see 69 Harv. L. Rev. 391 [blood transfusion, jaundice contracted from impure blood]; 7 Hastings L. J. 217 [same]; supra, §53.) But in *Gottsdanker v. Cutter Laboratories* (1960) 182 C.A.2d 602, 609, 6 C.R. 320, infra, §113, the court refused to interpret this statute as applicable to all biologics. Accordingly, defendant, furnishing Salk polio vaccine which contained live virus instead of inactivated virus, was held liable for breach of the warranties of fitness and merchantability.

The court also answered the argument that public policy calls for rejection of the warranty in the case of "new" drugs: "The argument is that development of medicines will be retarded if manufacturers are held to strict liability for their defects. While this argument might have merit if the warranty involved had to do with the mere failure of a medicine to cure or of a vaccine to prevent, it seems to be of but little weight where, as here, the warranty is limited to an assurance that the product will not actively cause the very disease it was designed to prevent." (182 C.A.2d 611.) (See 13 Stanf. L. Rev. 645.)

In *Shepard v. Alexian Bros. Hosp.* (1973) 33 C.A.3d 606, 109 C.R. 132, the court elaborately examined the judicial expressions and policy considerations underlying *Health & Saf.C. 1606*, and reaffirmed the rule that furnishing of a blood transfusion is a service, not a sale, and therefore does not carry with it an implied warranty. (33 C.A.3d 614.)

The same statutory immunity protects the defendant from a tort action based on strict liability. (See *Shepard v. Alexian Bros. Hosp.*, supra; *Klaus v. Alameda-Contra Costa Med. Assn. Blood Bank* (1976) 62 C.A.3d 417, 418, 133 C.R. 92; *Cramer v. Queen of Angels Hosp.* (1976) 62 C.A.3d 812, 815, 133 C.R. 339; *McDonald v. Sacramento Med. Foundation Blood Bank* (1976) 62 C.A.3d 866, 869, 870, 133 C.R. 444; *Fogo v. Cutter Laboratories* (1977) 68 C.A.3d 744, 750, 137 C.R. 417; 18 Santa Clara L. Rev. 553 [Fogo]; 7 U.C. Davis L. Rev. 196 [urging that strict liability should be imposed]; 6 Summary (10th), Torts, §1522.)

(2) *Statutory Duties Imposed on Blood Banks.* The statutory rule remains unchanged, but the 1974 Legislature enacted a series of sections requiring laboratory tests of blood to detect the presence of viral hepatitis and the reporting of carrier donors found to have given blood associated with hepatitis. Blood banks are forbidden to receive blood from reported donors. (*Health & Saf.C. 1600.7 et seq., 1603.1, 1603.2*; see 6 *Pacific L. J.* 243.) In 1985, *Health & Saf.C. 1603.1* was amended to require testing for HIV, and the reporting of carrier donors. And *Health & Saf.C. 1603.5*, enacted in 1975, requires blood banks to label containers of blood as either "volunteer donor" or "paid donor" blood, but declares that no warranty is to be implied from this labeling. (See 7 *Pacific L. J.* 356; 64 *A.L.R.5th* 333 [liability for donee's contraction of AIDS from blood transfusion].)

(3) *Biologics Used on Animals.* Producers of biologics used on animals must be licensed, and the biologics must be tested and registered as a prerequisite to sale. (*Food & Ag.C. 9201 et seq.*; see 6 *Pacific L. J.* 161.)

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6. Condition of Bottle.

4 Witkin Sum. Cal. Law Sales § 107

[§ 107] Condition of Bottle.

Where injury has resulted from the bursting of a beverage bottle, the tendency in California has been to sue in tort, invoking the doctrine of *res ipsa loquitur*. (See *1 Cal. Evidence (4th), Burden of Proof and Presumptions*, §135; as to action on theory of strict liability, see *6 Summary (10th), Torts*, §1428 et seq.) Whether a warranty basis of recovery exists has been the subject of dispute, both here and elsewhere. (See U.C.C. 2314(2)(e) [requiring, as a criterion of merchantability, that goods be "adequately contained, packaged, and labeled as the agreement may require"]; *8 U.C.L.A. L. Rev.* 306.)

In *Vallis v. Canada Dry Ginger Ale* (1961) *190 C.A.2d* 35, *11 C.R.* 823, plaintiff, employee in a restaurant, alleged injuries from an exploding bottle of club soda sold by defendant to his employer. Reversing a judgment of nonsuit, the court repudiated the distinction between the container and its contents, and followed Prosser's view that the warranty should cover both: "We have concluded that there was an implied warranty ... with respect to the bottle herein involved." (*190 C.A.2d* 42.) The court also determined that the warranty applies even in the case of returnable bottles. (*190 C.A.2d* 40, footnote 3.) (See also *Trust v. Arden Farms Co.* (1958) *50 C.2d* 217, 235, *324 P.2d* 583 [dissent]; *Jones v. Burgermeister Brewing Corp.* (1961) *198 C.A.2d* 198, 204, *18 C.R.* 311; *Vassallo v. Sabatte Land Co.* (1963) *212 C.A.2d* 11, 16, *27 C.R.* 814; *Williams v. Beechnut Nutrition Corp.* (1986) *185 C.A.3d* 135, 142, *229 C.R.* 605 [breakable glass juice bottle intended for infants]; *6 U.C.L.A. L. Rev.* 306; *36 A.L.R.4th* 419 [explosion or breakage of beverage bottle].)

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 - 1. Bones and Other Hard Substances.

4 Witkin Sum. Cal. Law Sales § 108

[§ 108] Bones and Other Hard Substances.

(1) *Liability of Commercial Restaurant Establishments.* In *Mexicali Rose v. Superior Court* (1992) 1 C.4th 617, 4 C.R.2d 145, 822 P.2d 1292, plaintiff, a customer at defendant's restaurant, ordered a chicken enchilada, and sustained throat injuries when he swallowed a one-inch chicken bone. He sued on theories of negligence, breach of implied warranty, and strict liability. The trial court overruled defendants' demurrer; the Court of Appeal, bound by *Mix v. Ingersoll Candy Co.* (1936) 6 C.2d 674, 59 P.2d 144, issued mandamus directing the trial court to sustain the demurrer; the Supreme Court affirmed the Court of Appeal decision in part and reversed it in part.

(a) *Mix and its progeny: The foreign-natural test and reasonable expectations of consumer.*

(1) Liability of the seller of food or restaurant owner on implied warranty was established in early *California cases*. (1 C.4th 621; citing *Klein v. Duchess Sandwich Co.* (1939) 14 C.2d 272, 282, 93 P.2d 799, *infra*, §112, *Vaccarezza v. Sanguinetti* (1945) 71 C.A.2d 687, 689, 163 P.2d 470, and *Goetten v. Owl Drug Co.* (1936) 6 C.2d 683, 686, 59 P.2d 142.)

But a different rule was developed by *Mix*, where the injury was caused by an object deemed *natural* to the food (a chicken bone in a chicken pot pie). (1 C.4th 622, 623.) *Mix* also held that it was not negligence to fail to furnish an entirely boneless chicken pie, and the holding was followed in *Silva v. F.W. Woolworth Co.* (1938) 28 C.A.2d 649, 83 P.2d 76. (1 C.4th 623.)

(2) In adopting the Uniform Commercial Code sections on implied warranties, the Legislature was aware of and recognized the *Mix rule*. (1 C.4th 624.)

(b) *Evolution of Mix rule.*

(1) Some courts have deviated from strict application of the foreign-natural distinction, and have used the approach of whether the consumer reasonably should have anticipated the natural injury-producing substance in the food. In these cases the "naturalness" of the substance was used to determine which theory of recovery should be allowed. (1 C.4th

626.) Thus, in a Louisiana case, *Title v. Pontchartrain Hotel*, 449 So.2d 677, the court concluded that the foreign-natural test would still be employed to determine whether the food was unfit as a matter of law, but that the negligence standard of "reasonableness" would still be employed to determine whether a defendant could be liable in negligence. (1 C.4th 628.) The *Title* court's reasoning was adopted in *Evart v. Suli* (1989) 211 C.A.3d 605, 259 C.R. 535, and in a number of out-of-state cases. (1 C.4th 629.)

(2) "In sum, the trend developing in courts recently considering the issue whether a plaintiff may recover for injuries caused by a natural or foreign substance can be summarized as follows: If the injury-producing substance is natural to the preparation of the food served, it can be said that it was reasonably expected by its very nature and the food cannot be determined to be unfit for human consumption or defective. Thus, a plaintiff in such a case has no cause of action in implied warranty or strict liability. The expectations of the consumer do not, however, negate a defendant's duty to exercise reasonable care in the preparation and service of the food. Therefore, if the presence of the natural substance is due to a defendant's failure to exercise due care in the preparation of the food, an injured plaintiff may state a cause of action in negligence. By contrast, if the substance is foreign to the food served, then a trier of fact additionally must determine whether its presence (i) could reasonably be expected by the average consumer and (ii) rendered the food unfit for human consumption or defective under the theories of the implied warranty of merchantability or strict liability." (1 C.4th 630.)

(c) *The new tests.* In deciding the liability of a restaurateur for injuries caused by harmful substances in food, the proper tests to be used by the trier of fact are as follows:

(1) "If the injury-producing substance is natural to the preparation of the food served, it can be said that it was reasonably expected by its very nature and the food cannot be determined unfit or defective. A plaintiff in such a case has no cause of action in strict liability or implied warranty. If, however, the presence of the natural substance is due to a restaurateur's failure to exercise due care in food preparation, the injured person may sue under a negligence theory." (1 C.4th 633.)

(2) "If the injury-causing substance is foreign to the food served, then the injured patron may also state a cause of action in implied warranty and strict liability, and the trier of fact will determine whether the substance (i) could be reasonably expected by the average consumer and (ii) rendered the food unfit or defective. Such a rule corresponds to our Legislature's adoption of California *Uniform Commercial Code* sections 2314 and 2315; the *Restatement Second of Torts*, section 402A; and the development of our common law." (1 C.4th 633, citing *Evart* as agreeing with *Title*, and overruling *Mix* to the extent that it precludes a cause of action in negligence.) (See 27 *Loyola L.A. L. Rev.* 397 [*Mexicali Rose*]; 20 *Pepperdine L. Rev.* 382 [same]; 1 *A.L.R.5th* 1 [liability for injury or death from foreign object in food]; 2 *A.L.R.5th* 189 [liability for injury or death from object related to food product, but not intended to be present in it]; *Rest.3d, Torts: Products Liability* §7 [replacing *Rest.2d, Torts* §402A insofar as food is concerned].)

(2) *Liability of Food Retailer.* The tests for liability established in *Mexicali Rose*, *supra*, were extended to the retail sale of raw meat to a consumer who then prepared the meat at home. In *Ford v. Miller Meat Co.* (1994) 28 C.A.4th 1196, 33 C.R.2d 899, plaintiff purchased packaged ground beef at a supermarket, tasted a portion of it while browning it at home, and injured a tooth when she bit down on a bone fragment. She sued defendants, the supermarket and its meat supplier, on theories of negligence, breach of implied warranty, and strict liability. The trial judge, in a nonjury trial, found for defendants at the conclusion of plaintiff's case. *Held*, affirmed.

(a) *No recovery on warranty and strict liability theories.* A bone fragment is a natural substance under the foreign-natural distinction of *Mexicali Rose*. Thus, an action for strict liability or breach of warranty is precluded. (28 C.A.4th 1202.)

(b) *No recovery on negligence theory.* Plaintiff relied on the doctrine of *res ipsa loquitur* to create a presumption of defendants' negligence, but she failed to meet the conditions of that doctrine. The trial judge found that the bone fragment was no larger than one-eighth inch and that no one could reasonably expect the vendor to remove such a small

particle of bone from ground beef. "That determination is the same as finding the presence of the bone fragment could not be attributed to lack of due care, actual or presumed." (28 C.A.4th 1203.)

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4 *Witkin Sum. Cal. Law Sales* § 109

[§ 109] Other Conditions.

The holding in *Reese v. Smith* (1937) 9 C.2d 324, 328, 329, 70 P.2d 933, that the presence of maggots in food does not constitute sufficient proof of unwholesome quality, was nullified by later cases. (See *Klein v. Duchess Sandwich Co.* (1939) 14 C.2d 272, 282, 93 P.2d 799 [maggots in sandwich]; *Medeiros v. Coca-Cola Bottling Co. of Turlock* (1943) 57 C.A.2d 707, 713, 135 P.2d 676.) In the *Medeiros* case, where discovery of a cleaning brush in a Coca-Cola bottle caused nausea and sickness, the court expressly rejected the contention that liability could only be based upon proof that the contents were unfit for consumption, and approved the doctrine that sickness or shock caused by the presence of a disgusting object will justify recovery. (Cf. *Tidlund v. Seven Up Bottling Co. of Los Angeles* (1957) 154 C.A.2d 663, 666, 316 P.2d 656 [rule recognized but plaintiff's testimony disbelieved by jury]; and see 96 A.L.R.3d 451 [trichinosis in pork]; 87 A.L.R.4th 804 [spoilage or contamination of beverage]; 90 A.L.R.4th 12 [foreign substance in beverage]; 2 A.L.R.5th 1 [spoilage, contamination, or other deleterious condition of food].)

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4 Witkin Sum. Cal. Law Sales § 110

[§ 110] Consumer's Negligence No Defense.

In *Kassouf v. Lee Bros.* (1962) 209 C.A.2d 568, 26 C.R. 276, the court affirmed a judgment for damages for intestinal disorders resulting from eating a contaminated chocolate bar. On appeal, defendant contended that it was error to refuse an instruction on contributory negligence. *Held*: (1) There is no duty of care on the part of a buyer of such a food product to inspect it before eating. (2) Even if the buyer was at fault in continuing to eat it without looking after becoming aware of the peculiar taste, the liability on warranty is absolute, and contributory negligence is not a defense. The opinion adds: "The case has called for our decision only on the subject of food products, and the decision is limited to that subject." (209 C.A.2d 573.) (See generally 36 So. Cal. L. Rev. 490; 4 A.L.R.3d 501 [contributory negligence as defense in action for breach of implied warranty]; on abrogation of contributory negligence defense and substitution of system of comparative negligence, see 6 *Summary* (10th), *Torts*, §1327 et seq.)

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4. Allergy as Defense.

4 Witkin Sum. Cal. Law Sales § 111

[§ 111] Allergy as Defense.

Where injury is caused not by a defect in the goods but by the user's allergy, the courts generally refuse to find any breach of warranty unless the hypersensitive reaction is encountered in a substantial number of users. (See *Magee v. Wyeth Laboratories* (1963) 214 C.A.2d 340, 352, 29 C.R. 322; 24 So. Cal. L. Rev. 221; 67A Am.Jur.2d (2003 ed.), Sales §726; supra, §105.)

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c. No Requirement of Privity.

1. Food, Drugs, and Home Pesticides.

4 Witkin Sum. Cal. Law Sales § 112

[§ 112] Food, Drugs, and Home Pesticides.

The warranty problem presented by the sale of food and drugs is a special one. Ordinarily, a person buys a car or radio for his or her own use, and may, as buyer and owner, sue for damages for defects. But it is common to buy food and drugs for a family and guests, and frequently someone other than the buyer is injured by the unwholesome product.

The California courts originally followed the privity rule. (See *Binion v. Sasaki* (1935) 5 C.A.2d 15, 16, 41 P.2d 585 [husband bought poisoned vegetables; wife, who ate them, denied recovery]; cf. *Dryden v. Continental Baking Co.* (1938) 11 C.2d 33, 37, 77 P.2d 833 [suggesting that wife might be able to recover as third-party beneficiary of contract of purchase]; see also *Jensen v. Berris* (1939) 31 C.A.2d 537, 540, 88 P.2d 220.) However, there has been an increasing tendency, evidenced in various types of pure food and drug statutes, to hold the manufacturer or wholesaler responsible as a matter of public policy. The privity requirement was accordingly abandoned in later decisions and the ultimate consumer, whether buyer or not, was permitted to sue either the seller or manufacturer. (See *Klein v. Duchess Sandwich Co.* (1939) 14 C.2d 272, 283, 93 P.2d 799; 23 Cal. L. Rev. 621; 43 Cal. L. Rev. 628; 52 Harv. L. Rev. 328; C.E.B., 1 UCC Sales and Leases, §3.29; 2 American Law of Products Liability 3d, §21:48.)

In *Klein v. Duchess Sandwich Co.*, *supra*, the husband bought a wrapped sandwich from a dealer, and the wife was poisoned. *Held*, the action was properly brought against the manufacturer. The privity defense was similarly rejected in an action for damages suffered when a milk bottle, sold and delivered by defendants, broke in the hands of plaintiff, daughter of the buyer. (*Vassallo v. Sabatte Land Co.* (1963) 212 C.A.2d 11, 17, 27 C.R. 814 [following *Gottsdanker v. Cutter Laboratories* (1960) 182 C.A.2d 602, 6 C.R. 320, *infra*, §113].) (See also 10 *Hastings L. J.* 425 [animal food]; 34 *So. Cal. L. Rev.* 408 [cigarettes]; 79 *A.L.R.2d* 431, 482 [cosmetics and cleansers]; 46 *A.L.R.4th* 1197 [perfumes, colognes, deodorants]; 54 *A.L.R.4th* 574 [personal soap]; on the exception in the sale of biologics, see *infra*, §113.)

In *Arnold v. Dow Chemical Co.* (2001) 91 C.A.4th 698, 110 C.R.2d 722, the rationale supporting the privity exception for food and drugs was extended to pesticides "which are solely intended to rid human habitation of pests." (91 C.A.4th 720.) The court rejected defendant manufacturer's contention that prior case law, including *Burr v. Sherwin Williams Co.* (1954) 42 C.2d 682, 268 P.2d 1041, *supra*, §88, foreclosed such an extension. (91 C.A.4th 720, 721.)

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4 *Witkin Sum. Cal. Law Sales* § 113

[§ 113] Biologics.

In *Gottsdanker v. Cutter Laboratories* (1960) 182 C.A.2d 602, 6 C.R. 320, defendant manufactured and sold Salk polio vaccine that contained live virus instead of only inactivated virus. It was injected into children and caused the disease of poliomyelitis. In this action by the children against the manufacturer, both types of privity were lacking: (1) Defendant manufacturer was not the seller, but sold to pharmacies which resold to doctors; and (2) plaintiff children were not the actual buyers. Nevertheless, the court, after determining that the furnishing of vaccines carried implied warranties (see *supra*, §105), held that lack of privity was not a defense.

(a) *Manufacturer was not the seller.* On this first and basic aspect of the privity requirement, the court thought that both logic and policy considerations made the food products exception applicable to drugs and vaccines: "We can conceive of no reason for applying the rule to foodstuffs which does not equally extend to drugs. The vaccine here involved is, like food products, designed solely for introduction into the body of a human being." (182 C.A.2d 607.)

(b) *Injured plaintiff was not the buyer.* Again applying the analogy of the food products cases, the court saw no reason why the manufacturer should escape liability merely because the ultimate consumer was not a buyer under a contract of sale: "The vaccine here used was manufactured for the express purpose of supplying doctors who would inject it into the bodies of persons seeking inoculation against poliomyelitis. Clearly it is the patient, and not the doctor, who is the ultimate consumer of the vaccine. While a sale is essential to impose liability under the implied warranties, the initial sale to distributor or retailer of pharmaceuticals is sufficient to impose upon the manufacturer the responsibility of fulfilling the implied warranties which run to the benefit of the persons whom the manufacturer intended to be, and who in fact become, the 'consumers.' " (182 C.A.2d 609.) (See 13 *Stanf. L. Rev.* 645, criticizing the result; 2 *American Law of Products Liability* 3d, §21:48; *BAJI*, No. 9.63.)

In another polio vaccine case, defendant manufacturer sold the vaccine to local medical societies, whose members administered it to plaintiffs. The evidence supported recovery on theories of express warranty and strict liability, neither of which required a showing of privity. (*Grinnell v. Charles Pfizer & Co.* (1969) 274 C.A.2d 424, 433, 79 C.R. 369; on strict liability in tort, see 6 *Summary* (10th), *Torts*, §1428 et seq.)

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E. Delivery Provisions.
1. In General.

4 Witkin Sum. Cal. Law Sales § 114

[§ 114] In General.

The delivery provisions in a contract for the sale of goods have a substantial effect on the rights and obligations of the parties. These provisions determine: (1) which party shall bear the responsibilities of ownership, such as risk of loss, during transit; (2) what the seller must accomplish to effect a conforming tender of the goods (see *infra*, §143); and (3) the total delivered price. (See generally C.E.B., 1 UCC Sales and Leases, Chap. 9; Cal. Transactions Forms, 4 Business Transactions §24.251 et seq.; 67 *Am.Jur.2d* (2003 ed.), *Sales* §507.)

U.C.C. 2319 et seq. are rules of construction intended to provide uniform interpretation of the delivery provisions in commercial use. They apply only to the extent that the parties do not otherwise agree to varying details of delivery. (See U.C.C. 1102(3), (4), *supra*, §13; but see U.C.C. 2320, Official Comment 14 [in regard to C.I.F. provision (see *infra*, §117), "careful consideration is necessary before a printed form or clause is construed to mean agreement otherwise"].)

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SUPPLEMENT: [This section is current through the latest supplement]

U.C.C. 1102(3), (4), on the parties' agreement to vary details of delivery, were repealed and replaced in 2006 by U.C.C. 1302(a), (c) without substantive change.



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4 Witkin Sum. Cal. Law Sales § 115

[§ 115] F.O.B.

(1) *Definition and Effect of Term.* An F.O.B. contract obligates the seller to deliver the goods "free on board" the carrier or some geographic point. (See U.C.C. 2319, and Official Comments.)

Formerly, there was some uncertainty as to the legal effect of the term. A number of cases held that the characters "F.O.B." did not necessarily refer to delivery and title, but could be interpreted in a particular contract as referring merely to price; i.e., to indicate the total delivered price, the seller paying all charges up to the place of delivery. (See, e.g., *Johnson v. Banta* (1948) 87 C.A.2d 907, 910, 198 P.2d 100.) The Commercial Code repudiates this interpretation of "F.O.B." as merely a price term, and expressly characterizes it as a delivery term unless the parties otherwise agree. (U.C.C. 2319(1), and Official Comment 1.)

(2) *F.O.B. Place of Shipment.* When the term is "F.O.B. (place of shipment)," the seller must deliver the goods at that place in the manner provided by U.C.C. 2504 (see *infra*, §144). The seller must also bear the risk and expense of putting them into the possession of the carrier. (U.C.C. 2319(1)(a); see C.E.B., 1 UCC Sales and Leases, §9.18.)

(3) *F.O.B. Place of Destination.* If the term is "F.O.B. (place of destination)," the seller must transport the goods to that named destination at his or her own risk and expense, *and* must tender delivery there in the manner provided by U.C.C. 2503 (*infra*, §143). (U.C.C. 2319(1)(b); see C.E.B., 1 UCC Sales and Leases, §9.19.)

(4) *F.O.B. Intermediate Point.* The Code does not specifically provide for the delivery term, "F.O.B. (intermediate destination)." U.C.C. 2319, Official Comment 2 recognizes this use and advises that particular care be taken where the goods are to be reshipped to specify the exact point at which the cost and risk of transshipment is to shift to the buyer. (See C.E.B., 1 UCC Sales and Leases, §9.23.)

(5) *F.O.B. Carrier.* When the goods are shipped F.O.B. the place of shipment or destination and the term also includes "F.O.B. (carrier)," the seller is under an additional obligation to load the goods on board that named carrier at his or her own risk and expense. (U.C.C. 2319(1)(c); see C.E.B., 1 UCC Sales and Leases, §9.20.) The F.O.B. carrier term includes shipment by "vessel, car or other vehicle." (See U.C.C. 2319(1)(c); on F.O.B. vessel, see *infra*, §116.)

(6) *Buyer's Obligations.* When the contract is for F.O.B. (place of shipment) or F.O.B. (carrier), the buyer must

seasonably provide the seller with any instructions necessary for making delivery. Failure to comply with this requirement may be treated as a failure of cooperation, and the seller may, at his or her option, move the goods in any reasonable manner in preparation for shipment or delivery. (U.C.C. 2319(3), and see Official Comment 3.)

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3. F.O.B. Vessel, F.A.S., and Ex-Ship.

4 Witkin Sum. Cal. Law Sales § 116

[§ 116] F.O.B. Vessel, F.A.S., and Ex-Ship.

(1) *F.O.B. Vessel.* A sale "F.O.B. vessel" requires the seller to load the goods at his or her own risk and expense, as with any F.O.B. carrier term. (See *supra*, §115.) If the shipment is overseas, the seller has a further obligation--to obtain a negotiable bill of lading stating that the goods have been loaded on board. (See U.C.C. 2319(1)(c), 2323.)

(2) *F.A.S.* "Free alongside" differs from F.O.B. vessel in two respects: (a) The seller delivers alongside the vessel at his or her own risk and expense, but the burden shifts to the buyer before rather than after loading; and (b) the seller must obtain and tender a receipt for the goods for which the carrier will issue a bill of lading. (U.C.C. 2319(2); see C.E.B., 1 UCC Sales and Leases, §9.25.) Delivery must be to the dock designated by the buyer or alongside a designated vessel in the manner usual in that port. (U.C.C. 2319(2)(a).)

(3) *Delivery Instructions by Buyer.* Under either F.O.B. vessel or F.A.S., the buyer must "seasonably" give any necessary delivery instructions, including the loading berth of the vessel and, where needed, its name and sailing date. Failure to supply this information may be treated by the seller as a failure of cooperation; and the seller may, at his or her option, move the goods in any reasonable manner in preparation for shipment or delivery. (U.C.C. 2319(3).)

(4) *Payment Against Documents.* Under either F.O.B. vessel or F.A.S., payment is made against tender of any required documents, and the "seller may not tender nor the buyer demand delivery of the goods in substitution for the documents." (U.C.C. 2319(4); see C.E.B., 1 UCC Sales and Leases, §9.21.)

(5) *Delivery Ex-Ship.* A term for delivery "ex-ship" (from the carrying vessel), or an equivalent term, requires delivery from a vessel at a named destination port and at a place where goods of the kind are usually discharged. (U.C.C. 2322(1).) The seller bears the expense and risk of loss until the goods are properly unloaded. Additionally, the seller must discharge any liens arising from the carriage and furnish the buyer with all documents necessary to obtain delivery. (U.C.C. 2322(2); see C.E.B., 1 UCC Sales and Leases, §9.39.) Unless the agreement restricts the seller to delivery from a particular vessel, no such restriction applies. (U.C.C. 2322(1), and see Official Comment 2.)

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4. C.I.F.

4 Witkin Sum. Cal. Law Sales § 117

[§ 117] C.I.F.

(1) *Nature of Term.* Where delivery is C.I.F. ("cost, insurance and freight"), the seller arranges prepaid, insured shipment to the named destination, adding the expense to the selling price of the goods. (See U.C.C. 2320(1), (2), and Official Comment 1; but see C.E.B., 1 UCC Sales and Leases, §9.27 [pointing out ambiguity in Code as to exact point at which seller's responsibility terminates under some C.I.F. contracts].)

(2) *Seller's Obligations.* The seller must, at his or her own risk and expense: (a) put the goods into the carrier's possession at the port of shipment and obtain a negotiable bill of lading; (b) load the goods, pay or provide for freight charges, and obtain a receipt; (c) obtain insurance covering the goods in transit and payable to the buyer or for the account of whom it may concern; (d) prepare an invoice and procure any other documents required to effect shipment or comply with the contract; and (e) forward and tender "with commercial promptness" all documents and indorsements necessary to perfect the buyer's rights. (U.C.C. 2320(2), and see Official Comment 3 et seq.; C.E.B., 1 UCC Sales and Leases, §9.27 et seq.; 17 *A.L.R.3d* 1010, 1065.)

(3) *Buyer's Obligations.* Payment must be made against tender of the required documents, and the buyer cannot demand delivery of the goods in substitution for the documents. (U.C.C. 2320(4).) This requires the buyer to pay for the goods before having an opportunity to inspect them, but such payment does not constitute an acceptance and does not impair any remedies otherwise available to the buyer. (See U.C.C. 2320, Official Comment 12.)

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5. C.I.F. Modifications.

4 Witkin Sum. Cal. Law Sales § 118

[§ 118] C.I.F. Modifications.

(1) *C. & F.* In a C. & F. (or C.F.) contract, the price includes cost and freight to a named destination but does not include insurance. (See U.C.C. 2320(1).) With that exception, the seller has the same obligations and risks as under a C.I.F. provision. (U.C.C. 2320(3); see *Mitsui O.S.K. Lines, Ltd. v. Dynasea Corp.* (1999) 72 C.A.4th 208, 211, 212, 85 C.R.2d 1 [where, under C.F. contract, buyer agreed to include freight in its price to seller and seller agreed to prepay carrier's freight charges, carrier could not recover freight charges from buyer after seller failed to pay; there were no facts indicating buyer impliedly agreed to pay freight charges to carrier]; supra, §117.) A C. & F. contract is usually employed where the buyer desires to obtain insurance himself or herself, or where the seller is already obligated to obtain insurance as the buyer's agent pursuant to another agreement. (See U.C.C. 2320(3), Official Comment 16.)

(2) *"Net Landed Weights" and Similar Terms.* The risks of ordinary deterioration and shrinkage in transit may be shifted to the seller under a C.I.F. or C. & F. contract by indicating that the price is based on, or to be adjusted according to, "net landed weights," "delivered weights," "out turn" quantity or quality, or the like. The seller must make a reasonable estimate of the price, and it is due on tender of documents. A final adjustment of the price is made after delivery, and settlement must be made with "commercial promptness." (U.C.C. 2321(1), (2); see C.E.B., 1 UCC Sales and Leases, §9.38.)

The same allocation of risk may also be accomplished by a warranty of quality or condition on arrival. (U.C.C. 2321(2).)

(3) *Payment on or After Arrival.* Where the C.I.F. or C. & F. contract provides for payment on or after arrival, the seller must allow "such preliminary inspection as is feasible" by the buyer prior to payment. If, however, the goods are lost, payment is made against documents, as in a standard C.I.F. delivery, and is due at the time the goods should have arrived. (U.C.C. 2321(3), and see Official Comment.)

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6. Bill of Lading in Overseas Shipment.

4 Witkin Sum. Cal. Law Sales § 119

[§ 119] Bill of Lading in Overseas Shipment.

Where a contract for overseas shipment provides for delivery C.I.F., C. & F., or F.O.B. vessel, the seller must obtain a negotiable bill of lading. The bill of lading must state (1) that the goods have been loaded on board, if delivery is F.O.B. vessel, or (2) that they have been received for shipment, if delivery is C.I.F. or C. & F. (U.C.C. 2323(1); see *13 Am.Jur.2d (2000 ed.), Carriers §323 et seq.*)

A shipment is "overseas" within this provision "insofar as by usage of trade or agreement it is subject to the commercial, financing, or shipping practices characteristic of international deepwater commerce." (U.C.C. 2323(3); see C.E.B., 1 UCC Sales and Leases, §9.22.)

In international trade, it is a common practice to make several original bills of lading for a single shipment and to refer to each as a "part" of a "set of parts." (See generally *13 Am.Jur.2d (2000 ed.), Carriers §327.*) The Commercial Code generally prohibits duplicate bills of lading but authorizes this procedure, subject to prescribed conditions, for overseas shipments. (See U.C.C. 2323(2), 7304(1); C.E.B., 1 UCC Sales and Leases, §9.22.)

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7. No Arrival, No Sale.

4 Witkin Sum. Cal. Law Sales § 120

[§ 120] No Arrival, No Sale.

A "no arrival, no sale" term conditions the sale upon arrival of the goods. The seller must ship conforming goods and must tender them if they arrive. (U.C.C. 2324(a), and see Official Comment 1.) But, although assuming all risks of loss in transit, the seller is exempted from liability for nonarrival unless he or she causes it. (See U.C.C. 2324, and see also Official Comment 4 [distinguishing "to arrive" term]; C.E.B., 1 UCC Sales and Leases, §9.41 et seq.)

The buyer may proceed as if there had been a casualty to identified goods under U.C.C. 2613 (infra, §173) if, without fault of the seller, the goods arrive partly missing, after the contract time, or so deteriorated in quality as to no longer conform to the contract. (U.C.C. 2324(b), and see Official Comment 5.)

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4 Witkin Sum. Cal. Law Sales § 121

[§ 121] Sale on Approval.

(1) *Nature of Transaction.* Unless otherwise agreed, a sale is "on approval" if the buyer may return the goods even though they conform to the contract and if they are delivered to the buyer *primarily for use*. (U.C.C. 2326, and see Official Comment 1; 67 *Am.Jur.2d* (2003 ed.), *Sales* §451 et seq.)

(2) *Acceptance and Passage of Title and Risk.* Title to goods delivered on approval and risk of loss pass to the buyer only on acceptance. (U.C.C. 2327(1)(a); see 66 *A.L.R.3d* 190 [risk of loss].) The Code provides that use of the goods consistent with trial purposes is not an acceptance (U.C.C. 2327(1)(b)); impliedly, an inconsistent use would constitute an acceptance.

If the buyer fails to "seasonably" notify the seller of an election to return the goods, there is an acceptance. (U.C.C. 2327(1)(b); cf. former C.C. 1739 [title passed on retention for an unreasonable time]; *Buffalo Arms v. Remler Co.* (1960) 179 *C.A.2d* 700, 708, 4 *C.R.* 103 [delay of 3 months held unreasonable as matter of law, defendant buyer liable for price].) And acceptance of any part of conforming goods constitutes an acceptance of all of them. (U.C.C. 2327(1)(b), and see Official Comment 1.) (On rights of buyer's creditors, see *infra*, §135.)

(3) *Return Shipment.* A return shipment is at the seller's risk and expense; but a buyer who is a *merchant* (see *supra*, §28) is required to follow any reasonable instructions concerning the shipment. (U.C.C. 2327(1)(c), and see Official Comment 4.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nature of Transaction.* See *Wilson v. Brawn of Calif.* (2005) 132 *C.A.4th* 549, 557, 33 *C.R.3d* 769 [where mail order company accepted payment, including small "insurance fee," at time of order and then shipped goods, transaction was ordinary shipment contract (see text, §153) and not sale on approval, and thus risk of loss passed to customer at time of shipment; fact that customer may return goods for refund does not convert routine sale into sale on approval].



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4 Witkin Sum. Cal. Law Sales § 122

[§ 122] Sale or Return.

(1) *Nature of Transaction.* Unless otherwise agreed, a transaction in which goods are delivered *primarily for resale* and may be returned even though they conform to the contract is a "sale or return." (U.C.C. 2326(1)(b); see 67 *Am.Jur.2d* (2003 ed.), *Sales* §435 et seq.) The intent of this type of agreement is that the buyer may return goods that he or she is unable to resell.

U.C.C. 2326 recognizes that any "or return" rights extended to a buyer are so contrary to the intent of an ordinary agreement for the sale of goods as to require clear and explicit acknowledgment of the seller's acquiescence in the term. (Official Comment 3.) Thus, the "or return" term is considered a separate contract within the statute of frauds provisions for sales contracts (U.C.C. 2326(3)); and the term is also treated as contradicting the sale aspect of the contract for purposes of the provisions on parol evidence (U.C.C. 2326(3); see 2 *Cal. Evidence* (4th), *Documentary Evidence*, §59 et seq.).

(2) *Passage of Title and Risk.* Under the Sales Act, title passed to the buyer subject to being revested in the seller by the return or tender of the goods. (Former C.C. 1739.) The Commercial Code does not provide specific rules for passage of title, and the general rules for sales contracts should govern. (See U.C.C. 2401(2), (3), *infra*, §124 et seq.) The Code similarly does not specifically provide for the transfer of title back to the seller in the event the buyer elects to return the goods. (See C.E.B., 1 UCC Sales and Leases, §8.2 et seq.) The buyer holds the goods and returns them at his or her own risk and expense unless otherwise agreed. (U.C.C. 2327(2)(b), and see Official Comment 3.) (On rights of buyer's creditors, see *infra*, §135.)

(3) *Return of Goods.* Unless otherwise agreed, the buyer may return the whole of the goods or any commercial unit (see *supra*, §27) of them. Goods returned must be substantially in their original condition and the option to return them must be exercised "seasonably." (U.C.C. 2327(2)(a); see 93 *A.L.R.2d* 342 [time for return under former law].)

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SUPPLEMENT: [This section is current through the latest supplement]



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G. Sale by Auction.

4 Witkin Sum. Cal. Law Sales § 123

[§ 123] Sale by Auction.

The Commercial Code provisions governing auction sales are substantially similar to those of the Sales Act. (See U.C.C. 2328; cf. former C.C. 1741; see generally C.E.B., 1 UCC Sales and Leases, §2.51 et seq.; Cal. Civil Practice, 4 Business Litigation, §41:1 et seq.; 44 A.L.R.4th 110; 7 Am.Jur.2d (1997 ed.), Auctions and Auctioneers §1 et seq.; on the licensing and regulation of auctioneers, see 3 Summary (10th), Agency and Employment, §43.)

(1) A sale is completed by the auctioneer's announcement, either by the fall of the hammer or in some other customary manner. (U.C.C. 2328(2).)

(2) If goods are offered in lots (see supra, §27), each lot is the subject of a separate sale. (U.C.C. 2328(1).)

(3) Under pre-Code law, disputes often arose when a late bid was made simultaneously with the fall of the hammer. The Code provides a workable resolution of this problem by allowing the auctioneer, at his or her discretion, to ignore the late bid or to reopen the bidding. (U.C.C. 2328(2).)

(4) A bidder may retract a bid until the auction is completed, but retraction of a bid does not revive any previous bid. (U.C.C. 2328(3).)

(5) An auction sale is normally *with reserve* and the auctioneer can withdraw the goods at any time prior to completion of the sale. In an auction *without reserve* the auctioneer cannot withdraw the article or lot after calling for bids on it unless no bid has been made in a reasonable time. (U.C.C. 2328(3).) The auction is without reserve only if "the goods are in explicit terms put up without reserve." (U.C.C. 2328(3).) Thus, the item may be withdrawn after an announcement that the auction is without reserve but prior to its being put up. However, the announcement might be construed as a firm offer. (Official Comment 2; see U.C.C. 2205, supra, §35.)

(6) If the auctioneer knowingly receives a bid on the seller's behalf or if the seller makes or procures a bid without prior notice that he or she reserves a right to do so, the buyer may avoid the sale or take the goods at the price of the last good faith bid prior to completion of the sale. These provisions do not apply to bids at a forced sale. (U.C.C. 2328(4); see *Nevada Nat. Leasing Co. v. Hereford* (1984) 36 C.3d 146, 151, 203 C.R. 118, 680 P.2d 1077.)

An innocent auctioneer, who sells property for a principal who obtained it by fraud, is not liable to the true owner. (*Jessup v. Cattle Center* (1968) 259 C.A.2d 434, 439, 66 C.R. 361, 5 Summary (10th), Torts, §717.)

The prohibition of a seller's bid, except at a "forced sale" (U.C.C. 2328(4), *supra*), was applied in *Nevada Nat. Leasing Co. v. Hereford*, *supra*. Plaintiff Nevada National, a company leasing construction equipment, repossessed three pieces on default of a lessee, and Linke, plaintiff's credit manager, arranged for their sale at auction with Schick, an auctioneer. Then Linke and Schick secretly agreed that Linke would bid, to raise prices, without any intention to buy if he became the winning bidder. Defendant, before Linke started to bid, bid \$ 6,000, \$ 3,500 and \$ 500; after Linke's bids were concluded, defendant was successful with bids of \$ 10,000, \$ 6,100 and \$ 8,600. In this action by plaintiff for breach of contract, the trial court concluded that plaintiff and Schick had conspired to conduct an illegal auction, and awarded defendant (a) compensatory damages of \$ 14,700 (the difference between his winning bid and his last bid before Linke's first sham bid), and (b) punitive damages of \$ 10,000. *Held*, affirmed.

(a) The secret plan for sham bidding was unlawful and in direct violation of U.C.C. 2328, unless the proceeding was a "forced sale." (36 C.3d 151.)

(b) The statute does not define that term, but the purpose of the exception is obviously to encourage bidding at execution sales, which frequently result in unfair low prices obtained by sellers. (36 C.3d 152.) In the light of that purpose this was not a forced sale: (1) It was not analogous to a creditor's sale of repossessed *collateral*, for plaintiff was an owner, not an execution creditor. (36 C.3d 151.) (2) Plaintiff had several commercially reasonable alternatives to safeguard itself from an undesirable low price; e.g., because the auction was "with reserve," it could have refused the high bids; or, because it was the owner of the equipment, it could have sold the pieces before the auction or leased them again. (36 C.3d 152.) (See 44 A.L.R.4th 110, 151 [*Nevada Nat. case*].)

SUPPLEMENT: [This section is current through the latest supplement]
See 7 Am.Jur.2d (2007 ed.), *Auctions and Auctioneers* §1 et seq.



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V. TITLE, CREDITORS, AND GOOD FAITH PURCHASES
A. Title.

1. Approach of Commercial Code.

4 Witkin Sum. Cal. Law Sales § 124

[§ 124] Approach of Commercial Code.

Prior to the adoption of the Commercial Code, it was essential to know when title passed in a sale, because many of the rights and obligations of the parties depended upon the location of the title. The Code de-emphasized the importance of the concept in favor of a more direct approach to such questions as risk of loss (*infra*, §152 et seq.), insurable interest (*infra*, §141), the buyer's right to the goods (*infra*, §143), and the seller's right to payment (*infra*, §155). The provisions of Division 2 are drafted "in terms of contract for sale and the various steps of its performance. The legal consequences are stated as following directly from the contract and action taken under it without resorting to the idea of when property or title passed or was to pass as being the determining factor. The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character." (U.C.C. 2101, Official Comment; see generally C.E.B., 1 UCC Sales and Leases, §8.1 et seq.; Cal. Transactions Forms, 4 Business Transactions §24:232 et seq.; 3 Williston on Sales (5th), §23-1 et seq.; 63 *Harv. L. Rev.* 566 [Williston's criticism of Code approach]; 16 *Hastings L. J.* 561.)

U.C.C. 2401 states the governing principle: "Each provision of this division with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title." However, the Code contains rules for determining the location of title "[i]nsofar as situations are not covered by the other provisions of this division and matters concerning title become material." (U.C.C. 2401; see *infra*, §126 et seq.; 96 *Harv. L. Rev.* 470 [Disengaging Sales Law From the Sale Construct: A Proposal To Extend the Scope of Article 2 of the UCC].)

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A. Title.

2. Agreement of Parties Controlling.

4 Witkin Sum. Cal. Law Sales § 125

[§ 125] Agreement of Parties Controlling.

(1) *Former Sales Act.* Under the Sales Act, title to goods passed at such time as the parties intended it to pass. (See former C.C. 1738(1); *Woodbine v. Van Horn* (1946) 29 C.2d 95, 106, 173 P.2d 17; *Goldberg v. Southwestern Metals Corp.* (1949) 92 C.A.2d 819, 821, 208 P.2d 75; *Schuch v. Northrup-Jones* (1958) 162 C.A.2d 279, 285, 328 P.2d 279; *Carey v. Glenco Citrus Products Co.* (1965) 235 C.A.2d 572, 579, 45 C.R. 365.)

(2) *Commercial Code.* Goods must be identified to the contract before title can pass (see *infra*, §127), and after identification the buyer may have a "special property" and an insurable interest in the goods (see *infra*, §141). But, within these requirements, title passes to the buyer "in any manner and on any conditions explicitly agreed on by the parties." (U.C.C. 2401(1), and see Official Comment 1; as to seller's retention of a security interest, see *infra*, §145.) The Code thus provides a basic rule for passage of title by agreement that is similar in effect to that of the Sales Act but without reliance on the "intent" of the parties. (See 3A Anderson 3d (2002 Rev. ed.), §2-401:53 et seq.; C.E.B., 1 UCC Sales and Leases, §8.2 et seq.; 67 *Am.Jur.2d* (2003 ed.), Sales §357 et seq.)

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A. Title.

3. Rules Where No Contract Provision.

a. In General.

4 Witkin Sum. Cal. Law Sales § 126

[§ 126] In General.

The Sales Act set forth certain rules or presumptions that determined the passage of title where no contrary intention appeared. (See former C.C. 1739.)

The Code provides rules that do not call for inquiry into the intentions of the parties. They are based "upon the time when the seller has finally committed himself in regard to specific goods." (U.C.C. 2401, Official Comment 4; see 3A Anderson 3d (2002 Rev. ed.), §2-401:44 et seq.; C.E.B., 1 UCC Sales and Leases, §§8.2, 8.3, 8.14; 17 A.L.R.3d 1010, 1081.)

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A. Title.

3. Rules Where No Contract Provision.

b. Identification of Goods.

4 *Witkin Sum. Cal. Law Sales* § 127

[§ 127] Identification of Goods.

(1) *Former Law.* Under the Sales Act, title to specific goods passed when they were put in a deliverable state. (Former C.C. 1739, Rule 1; see former C.C. 1796(4) ["deliverable state" was one where buyer would be bound to take delivery under the contract]; *Todd v. Lyon* (1921) 55 C.A. 67, 71, 202 P. 899; *Turner, Kuhn & Fraser v. Jones* (1923) 61 C.A. 732, 735, 736, 215 P. 1033; *Grange Co. v. McCabe* (1938) 26 C.A.2d 597, 599, 600, 80 P.2d 135; *Brietengross v. Theodore Krumm* (1939) 35 C.A.2d 639, 642, 96 P.2d 370; *Aiello v. Sliskovich* (1945) 72 C.A.2d 39, 42, 163 P.2d 768; *Johnson v. Besoyan* (1948) 85 C.A.2d 389, 392, 193 P.2d 63; *Herrmann v. Fireman's Fund Ins. Co.* (1954) 127 C.A.2d 560, 571, 274 P.2d 501.) Where the seller was bound to do something to the goods to put them in a deliverable state, title did not pass until this was done. (Former C.C. 1739, Rule 2; see *Wanee v. Thomas* (1925) 75 C.A. 231, 246, 242 P. 509; *Todd v. Lyon*, *supra*.) Undivided shares in goods, or proportions of fungible goods, could be the subject of a sale; the buyer became an owner in common of the shares remaining, or the proportionate amount sold, in a manner similar to that provided by the Commercial Code (*infra*, this section). (See former C.C. 1726(2); 11 *Cal. L. Rev.* 290.)

However, where the contract was to sell future or unascertained goods, title did not pass upon their being put in a deliverable state; the further act of appropriation was required. (See former C.C. 1739; *supra*, §25.)

(2) *Commercial Code Rules.* "Title to goods cannot pass under a contract for sale prior to their identification to the contract." (U.C.C. 2401(1), and see Official Comment 2; 3A Anderson (1995 Rev. ed.), §2-401:53 et seq.; C.E.B., 1 UCC Sales and Leases, §§8.2, 8.28 et seq.; for time and manner of identification, see *infra*, §140.) The time of passage of title depends upon the type of performance required of the seller; i.e., whether shipment or delivery of the goods is required (see *infra*, §143 et seq.) or delivery is to be made without moving the goods (see *infra*, §129).

Fungible goods are those "of which any unit is, by nature or usage of trade, the equivalent of any other like unit." (U.C.C. 1201(17).) Examples are oil in a tank or grain in a bin. An undivided share in an identified bulk of such goods is sufficiently identified to be sold, even though the quantity of the bulk is undetermined. The buyer then becomes an owner in common of the proportionate amount sold. (U.C.C. 2105(4).)

The Code also authorizes the sale of a part interest in existing identified goods. (U.C.C. 2105(3).)

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SUPPLEMENT: [This section is current through the latest supplement]

(2) *Commercial Code Rules*. U.C.C. 1201(17), defining "fungible goods," was renumbered U.C.C. 1201(18) in 2006 without substantive change.



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A. Title.

3. Rules Where No Contract Provision.
c. Delivery to Buyer or Bailee Required.

4 *Witkin Sum. Cal. Law Sales* § 128

[§ 128] Delivery to Buyer or Bailee Required.

(1) *Seller To Deliver Goods at a Destination.* Where the contract for sale requires the seller to deliver the goods at a particular destination (as in an F.O.B. contract, *supra*, §115), title passes on tender at that destination. (U.C.C. 2401(2)(b); see C.E.B., 1 UCC Sales and Leases, §8.10 et seq.) Neither the reservation of a security interest (see *infra*, §145) nor the agreed delivery of a document of title at another time or place affects the operation of this rule. (See U.C.C. 2401(2).)

A similar Sales Act rule was applied in an unusual situation in *Capitain v. L.A. Wrecking Co. (1951) 37 C.2d 527, 233 P.2d 544*. Defendants agreed to move and deliver a house to plaintiff's land, to be placed on his foundations, and plaintiff paid over half the purchase price. Defendants temporarily removed the top portion and moved the house, but, while it was still on blocks, it burned. *Held*, title did not pass and plaintiff was entitled to the return of his purchase price. The circumstances justified the inference that delivery was not to be complete until the house was lowered onto the foundation with the roof restored. (37 C.2d 530.)

(2) *Seller To Arrange for Shipment of Goods.* Where the seller is not required to deliver the goods at a particular destination but is required or authorized to send them to the buyer (as in a C.I.F. contract, *supra*, §117), title passes at the time and place of shipment. (U.C.C. 2401(2)(a); see *California State Electronics Assn. v. Zeos Int. Ltd. (1996) 41 C.A.4th 1270, 1277, 49 C.R.2d 127* [where computers were sold by telephone and shipped at buyer's expense via overnight express service, and paperwork contained no provision requiring seller to deliver goods to buyer, sales agreements were "shipment" contracts under U.C.C. 2401(2)(a)]; C.E.B., 1 UCC Sales and Leases, §8.4.) Title passes when the seller completes performance despite the reservation of a security interest or an agreement to deliver a document of title at a different time or place. (See U.C.C. 2401(2).)

The former Sales Act rule was similar, but included a provision that title passed on delivery to the bailee even though the shipment was C.O.D. or its equivalent. (See former C.C. 1739, Rule 4(2); cf. *Hilmer v. Hills (1902) 138 C. 134, 139, 70 P. 1080* [title in C.O.D. sale did not pass until payment]; *Alonso v. Badger (1943) 58 C.A.2d 752, 758, 138 P.2d 24* [following *Hilmer*].) The Commercial Code does not state the effect of a C.O.D. term. (See 67 *Am.Jur.2d (2003 ed.)*, Sales §515.)

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A. Title.

3. Rules Where No Contract Provision.

d. Delivery Without Moving Goods.

4 *Witkin Sum. Cal. Law Sales* § 129

[§ 129] Delivery Without Moving Goods.

(1) *Seller To Deliver Documents*. Where delivery is to be made without moving the goods but the seller is to deliver documents of title, "title passes at the time when and the place where he delivers such documents." (U.C.C. 2401(3)(a); see 3A Anderson (2002 Rev. ed.), §2-401:65; C.E.B., 1 UCC Sales and Leases, §8.14 et seq.)

(2) *Present Sale*. Where the seller is not required to move the goods or deliver documents of title and the parties accomplish the sale by making the contract (i.e., a present sale, *supra*, §22), title passes at the time and place of contracting. (U.C.C. 2401(3)(b); see C.E.B., 1 UCC Sales and Leases, §8.16.) Such a transaction presupposes that the goods are identified. (U.C.C. 2401(3)(b), and see Official Comment 2.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Seller To Deliver Documents*. U.C.C. 2401(3)(a) was amended in 2006 to provide that if the seller "is to deliver a tangible document of title, title passes at the time when and the place where he delivers such documents and if the seller is to deliver an electronic document of title, title passes when the seller delivers the document."



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A. Title.
4. Title Revested in Seller.

4 Witkin Sum. Cal. Law Sales § 130

[§ 130] Title Revested in Seller.

Title to goods is revested in the seller when: (1) the buyer rejects goods (see *infra*, §161) or otherwise refuses to receive or retain them, whether or not this action is justified; or (2) the buyer justifiably revokes acceptance (see *infra*, §167). "Such revesting occurs by operation of law and is not a 'sale.' " (U.C.C. 2401(4); see 3A Anderson 3d (2002 Rev. ed.), §2-401:76 et seq.; C.E.B., 1 UCC Sales and Leases, §8.18.)

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A. Title.

5. Title or Possession Reserved for Security.
a. Only Security Interest Reserved.

4 Witkin Sum. Cal. Law Sales § 131

[§ 131] Only Security Interest Reserved.

"Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest." (U.C.C. 2401(1).) And the security interest thus acquired "is restricted to securing payment or performance by the buyer." (U.C.C. 2505, Official Comment 1; see generally 3A Anderson 3d (2002 Rev. ed.), §2-505:3 et seq.; C.E.B., 1 UCC Sales and Leases, §8.21; on seller's authority to ship under reservation, see *infra*, §145.)

The security interest is acquired by procurement from the shipper of a *negotiable* bill of lading (see *infra*, §138). (U.C.C. 2505(1)(a), and Official Comment 2; see U.C.C. 2310, Official Comment 2.) Alternatively the seller may reserve *possession* of the goods as security by procuring a *nonnegotiable* bill of lading but, except in the case of a conditional delivery, the bill must be taken in the name of a party other than the buyer. (See U.C.C. 2505(1)(b), and Official Comments 3, 4.)

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A. Title.

5. Title or Possession Reserved for Security.

b. Conditional Sale.

1. Pre-Code Case Law.

4 Witkin Sum. Cal. Law Sales § 132

[§ 132] Pre-Code Case Law.

(1) *In General.* A conditional sale is one in which the buyer receives possession of the goods and uses them, and the seller *retains title as security* for the payment of the purchase price. (See C.C. 2981(a) [defining conditional sale of motor vehicle]; *Hougham v. Rowland* (1939) 33 C.A.2d 11, 14, 90 P.2d 860; for comparison to Commercial Code approach, see C.E.B., Secured Transactions 2d, §1.31.) Reservation of title was its outstanding characteristic. A buyer who attempted to dispose of the property was guilty of theft. (P.C. 504a; *People v. Swenson* (1954) 127 C.A.2d 658, 662, 274 P.2d 229.) And the buyer could not pass title even to a bona fide purchaser. (*Bice v. Harold L. Arnold* (1925) 75 C.A. 629, 634, 243 P. 468.)

(2) *Form of Contract.* No particular form was necessary for an ordinary conditional sale, provided that an intention appeared to retain title. Such an intention could be drawn from the whole instrument. (*Peronnet v. Ralph* (1931) 112 C.A. 97, 103, 296 P. 329; see *Crestline Mobile Homes Mfg. Co. v. Pacific Finance Corp.* (1960) 54 C.2d 773, 777, 8 C.R. 448, 356 P.2d 192 [fine print statement at bottom of invoice: buyer "agrees that title to the trailers ... shall remain in Crestline ... until entire purchase price has been paid"]; on the formal requisites of a contract for sale of a motor vehicle, see *infra*, §239 et seq.) Thus, in *Bailly v. Looock* (1930) 103 C.A. 220, 226, 284 P. 235, where the seller agreed "to sell the property" and upon payment in full to execute "a bill of sale," the court held that there was a retention of title and hence a conditional sale. And a "lease contract," in which the lessee (buyer) acquires title after paying a certain number of installments of "rent," was held to be a conditional sale. (*Silverstin v. Kohler & Chase* (1919) 181 C. 51, 53, 183 P. 451; 2 Cal. L. Rev. 76; see also C.C. 2981(a) [defining conditional sale of motor vehicle to include bailment or lease contracts or lien transactions where the object is substantially a conditional sale]; C.C. 1802.6 [similar inclusive provisions in Unruh Act].)

(3) *Nature of Seller's Interest.* The seller retained a security interest similar to that of a mortgagee. The conditional sale served the same basic purpose as a chattel mortgage; but it was usually a more advantageous form of security to the seller, because recordation was not necessary in most cases and the seller could repossess after a breach without the necessity of bringing an action. (On rights of seller under conditional sale generally, see *Crestline Mobile Homes Mfg. Co. v. Pacific Finance Corp.*, *supra*; 67 A.L.R.2d 582 [seller's right to sue third person for damage to or destruction of property].) The conditional seller's interest was not a lien. (*Phelps v. Loupias* (1950) 97 C.A.2d 350, 355, 217 P.2d 748.)

The security title could be assigned (see *Parker v. Funk* (1921) 185 C. 347, 352, 197 P. 83), and it was subject to execution (*Escobar v. Rogers* (1920) 182 C. 603, 606, 189 P. 268).

(4) *Nature of Buyer's Interest.* The title reserved by the seller was for security only, to assure payment of the purchase price; in the absence of a default, the buyer had the use and possession of the property to the complete exclusion of the seller, and the buyer could secure title by performing his or her obligations without any further assent by the seller. "Both in a practical and a legal sense the buyer is the beneficial owner." (*San Diego v. Davis* (1934) 1 C.2d 145, 147, 33 P.2d 827; see also *Bowden v. Bank of America* (1950) 36 C.2d 406, 413, 224 P.2d 713; *Johnson v. Los Angeles* (1939) 31 C.A.2d 579, 582, 88 P.2d 725; 23 Cal. L. Rev. 557.)

Important characteristics of this beneficial ownership were as follows: (a) Risk of loss was on the buyer. (See *infra*, §151.) (b) A property tax could be assessed against the buyer. (*San Diego v. Davis*, *supra* [automobile].) (c) The buyer had an insurable interest in the property. (*Coniglio v. Connecticut Fire Ins. Co.* (1919) 180 C. 596, 599, 182 P. 275; on right of buyer to receive benefits of seller's insurance, see 72 Harv. L. Rev. 1380.) (d) The buyer's interest was subject to attachment and execution. (See *Casady v. Fry* (1931) 115 C.A. Supp. 777, 780, 6 P.2d 1019; *Mercantile Acceptance Corp. v. Pioneer Credit Indem. Co.* (1932) 124 C.A. 593, 596, 12 P.2d 988; 21 Cal. L. Rev. 51.) (e) The buyer could give a chattel mortgage, good against all save the seller. (*Pacific States Savings & Loan Co. v. Strobeck* (1934) 139 C.A. 427, 432, 33 P.2d 1063.) (f) The acceptance by the seller of a chattel mortgage on the same property did not supersede the conditional sale contract, since it was merely the substitution of one security interest for another. (*Bowden v. Bank of America*, *supra*.) (g) If the seller wrongfully repossessed, the buyer could sue for conversion. (*Luke v. Mercantile Acceptance Corp. of Calif.* (1952) 111 C.A.2d 431, 435, 244 P.2d 764.)

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5. Title or Possession Reserved for Security.

b. Conditional Sale.

2. Commercial Code Provisions.

4 Witkin Sum. Cal. Law Sales § 133

[§ 133] Commercial Code Provisions.

Under the Commercial Code, if the seller wishes to extend credit to the buyer *after* delivery, the sales aspects of the transaction are subject to Division 2; but, to the extent that the seller retains a security interest, the transaction is subject to the provisions of Division 9. (See U.C.C. 2102, and Official Comment; U.C.C. 9110, and Official Comments; C.E.B., Secured Transactions 2d, §1.31; *67 Am.Jur.2d* (2003 ed.), *Sales* §35.)

Thus, "conditional sales" and similar financing devices are treated as security interests. (See 4 *Summary* (10th), *Secured Transactions in Personal Property*, §17 et seq.)

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B. Rights of Creditors Against Sold Goods.
1. Seller's Creditors.

4 Witkin Sum. Cal. Law Sales § 134

[§ 134] Seller's Creditors.

(1) *Subject to Buyer's Right.* Except in the case of a fraudulent transfer or retention of the goods, the rights of the seller's unsecured creditors to identified goods are subject to the buyer's right to recover the goods. (U.C.C. 2402(1).)

(2) *Fraudulent Retention or Transfer of Goods.* A sale or an identification of goods to the contract may be treated as void by the seller's creditors if the seller's retention of possession is fraudulent as against them. (See *infra*, §215 et seq.) The seller's creditors may similarly prevail over the buyer where identification or delivery of the goods is made (a) "in satisfaction of or as security for a pre-existing claim for money, security or the like" rather than in the current course of trade, and (b) "under circumstances which under any rule of law of the state where the goods are situated would apart from this division constitute the transaction a fraudulent transfer or voidable preference." (U.C.C. 2402(3)(b).) (See generally C.E.B., 1 UCC Sales and Leases, §§12.28, 12.37.)

(3) *Secured Creditors.* The rights of a creditor under Division 9 of the Code, dealing with secured transactions (see 4 *Summary* (10th), *Secured Transactions in Personal Property*, §171), are not impaired by any provisions of the Sales Division of the Code. (U.C.C. 2402(3)(a).)

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2. Buyer's Creditors.

4 *Witkin Sum. Cal. Law Sales* § 135

[§ 135] Buyer's Creditors.

(1) *Goods Held on Approval.* Goods held on approval are generally not subject to claims of the buyer's creditors until the goods have been accepted. (U.C.C. 2326(2).)

(2) *Goods Held on Sale or Return.* Goods held on sale or return are subject to claims of the buyer's creditors while the goods are in the buyer's possession. (U.C.C. 2326(2).)

(3) *Goods Held on Consignment.* Goods which a deliverer or consignor used or bought for use for personal, family, or household purposes do not become the property of the deliverer or consignee unless the deliverer or consignee purchases and fully pays for them. Any payment received by the deliverer or consignee from a buyer of the goods, less any amount deducted for agreed commissions, fees, or expenses, becomes the deliverer's property and is not subject to claims of the deliverer's or consignee's creditors. (U.C.C. 2326(4) [nothing in the statute prevents the deliverer or consignee from acting as the deliverer's agent to transfer title to a buyer who pays the full purchase price]; see C.E.B., 1 UCC Sales and Leases, §12.60.)

Certain true consignment transactions were dealt with in former U.C.C. 2326(3) and former U.C.C. 9114. These sections were repealed in 1999 and replaced by new provisions in Division 9. (U.C.C. 2326, Official Comment 4; U.C.C. 9319, Official Comment 2; see 4 *Summary* (10th), *Secured Transactions in Personal Property*, §110.)

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C. Good Faith Purchase.

4 Witkin Sum. Cal. Law Sales § 136

[§ 136] Good Faith Purchase.

(1) *Power To Transfer*. A person taking goods by any form of purchase acquires all title that the transferor had or had power to transfer. (U.C.C. 2403(1), and Official Comment 1; see U.C.C. 1201(31) ["purchase" includes any voluntary transaction creating a property interest, such as taking by sale, discount, negotiation, mortgage, pledge, lien, issue or reissue, or gift].) If the purchase is of a limited interest, the purchaser acquires rights only to the extent of that interest. (U.C.C. 2403(1).)

(2) *Seller With Voidable Title*. A seller with a voidable title has power to transfer a good title to a good faith purchaser for value. (See *infra*, §232.)

(3) *Seller With Void Title*. A seller with a void title has no power to transfer a good title to a good faith purchaser for value. (See *infra*, §234.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Power To Transfer*. U.C.C. 1201(31), defining "purchase," was amended and renumbered U.C.C. 1201(29) in 2006. The amended subdivision adds "lease" to the examples of purchase.



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D. Goods Entrusted to Merchant.

4 *Witkin Sum. Cal. Law Sales* § 137

[§ 137] Goods Entrusted to Merchant.

"Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business." (U.C.C. 2403(2); see 36 *A.L.R.2d* 1362 [auctioneer]; 67 *Am.Jur.2d* (2003 ed.), *Sales* §411 et seq.) Entrustment of goods "includes any delivery and any acquiescence in retention of possession for the purpose of sale, obtaining offers to purchase, locating a buyer, or the like." (U.C.C. 2403(3); see C.E.B., 1 UCC Sales and Leases, §12.11 et seq.)

Subdivision (3) of U.C.C. 2403, supra, a departure from the Official Text of the Uniform Commercial Code, *limits the effect* of subdivision (2): "[T]he words 'for the purpose of sale, obtaining offers to purchase, locating a buyer, or the like' are words of limitation which describe the exclusive purposes of the delivery or acquiescence in retention of possession, which give a merchant in possession, who deals in goods of that kind, the power to transfer the ownership rights of those goods to a buyer in the ordinary course of business." (*Budget Rent-A-Car of Southern Calif. v. Bergman* (1981) 121 *C.A.3d* 256, 266, 175 *C.R.* 286.)

The rule is subject to two limitations: (1) The entrustment must be to a merchant (see supra, §28) who deals in goods of the kind entrusted; and (2) protection is limited to "buyers in ordinary course of business" (see supra, §15) and does not extend to "good faith purchasers" (see U.C.C. 1201(19)). (See U.C.C. 2403, West's California Code Comment; U.C.C. 2403, Official Comment 3; C.E.B., 1 UCC Sales and Leases, §12.14 et seq.; 59 *A.L.R.4th* 567 [what is "entrusting" goods to merchant dealer under Unif.Com.C. §2-403].)

SUPPLEMENT: [This section is current through the latest supplement]
U.C.C. 1201(19), defining "good faith," was renumbered U.C.C. 1201(20) in 2006.



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CHAPTER V - Sales

Witkin Summary of California Law
V. TITLE, CREDITORS, AND GOOD FAITH PURCHASES
E. Transfer of Document of Title.
1. Nature of Document.

4 Witkin Sum. Cal. Law Sales § 138

[§ 138] Nature of Document.

(1) *In General.* " 'Document of title' includes a bill of lading, dock warrant, dock receipt, warehouse receipt, gin ticket, or compress receipt, and any other document that, in the regular course of business or financing, is treated as adequately evidencing that the person entitled under the document (Section 7403(4)) has the right to receive, hold, and dispose of the document and the goods it covers. To be a document of title, a document shall purport to be issued by a bailee and purport to cover goods in the bailee's possession that either are identified as or are fungible portions of an identified mass." (U.C.C. 1201(15) [defining document of title and revising Official Text to refer to gin ticket and compress receipt instead of "order for the delivery of goods"]; see also U.C.C. 1201(44) [defining warehouse receipt and greatly enlarging Official Text]; cf. 1 U.L.A. (Master Ed.), §1-201(15) [including "order for the delivery of goods"]; see generally C.E.B., 1 UCC Sales and Leases, §8.15; 21 A.L.R.3d 1339 [construction and effect of U.C.C., Art. 7].)

(2) *Bill of Lading.* The Code defines a bill of lading as a document issued in receipt of goods by a shipper which "evidences the intention of the issuer that the person entitled under the document (Section 7403(4)) has the right to receive, hold, and dispose of the document and the goods it covers." (U.C.C. 1201(6).)

Thus the bill of lading has three chief aspects: It is (a) a *receipt* for the goods; (b) a *contract* for their carriage; and (c) a *document of title*. (See *Pioneer Fruit Co. v. Southern Pac. Co.* (1920) 47 C.A. 44, 46, 190 P. 50; *Bedig v. Southern Pac. Co.* (1927) 84 C.A. 325, 333, 258 P. 148.) Where the shipment is in *interstate commerce*, the bill of lading is subject to federal and not state law. (*New York Cen. R. Co. v. Frank H. Buck Co.* (1935) 2 C.2d 384, 389, 41 P.2d 547; *Bedig v. Southern Pac. Co.*, *supra*; *Stefani v. Southern Pac. Co.* (1931) 119 C.A. 69, 72, 5 P.2d 946.)

(3) *Negotiable and Nonnegotiable Documents.* Documents of title may be negotiable or nonnegotiable. A document is negotiable if it provides for delivery of the goods to "bearer" or to the order of a named person or, where recognized in overseas trade, it runs to a "named person or assigns." (U.C.C. 7104(1), and see Official Comment 1; 5 *Hastings L. J.* 103.) Any other document is nonnegotiable. (U.C.C. 7104(2); see 7A Anderson 3d (1995 Rev. ed.), §§7-104:4, 7-104:8.) Where a bill of lading states that goods are consigned to a named person, the bill is not made negotiable by a provision that the goods are to be delivered only against a written order signed by that person or another named person. (U.C.C. 7104(2).)

A warehouse receipt or bill of lading that is nonnegotiable must be conspicuously marked "nonnegotiable." (U.C.C.

7104(3); on what is conspicuous, see U.C.C. 1201(10).) A bailee who fails to comply with this requirement may be subject to the same liabilities that would have been incurred had the document been negotiable. (See U.C.C. 7104(3); *BII Finance Co. v. U-States Forwarding Services Corp.* (2002) 95 C.A.4th 111, 121, 123, 115 C.R.2d 312, 13 Summary (10th), *Personal Property*, §178 [under U.C.C. 7104(3), carrier had same liabilities with regard to bills of lading that it would have incurred had documents been negotiable; bills were not marked "nonnegotiable" and shipper's assignee, who purchased them from shipper for value, elected to treat them as negotiable].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* U.C.C. 1201(15), defining "document of title," was amended and renumbered U.C.C. 1201(16) in 2006. The amended subdivision deletes "gin ticket" and "compress receipt" and replaces them with "order for the delivery of goods."

U.C.C. 7403(4) was amended in 2006, and the definition of "person entitled under the document" was transferred to U.C.C. 7102.

U.C.C. 1201(44) was amended and renumbered U.C.C. 1201(42) in 2006. The amended subdivision reads, in its entirety, as follows: " 'Warehouse receipt' means a receipt issued by a person engaged in the business of storing goods for hire."

(2) *Bill of Lading.* U.C.C. 1201(6) was amended in 2006 to define bill of lading as "a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods." (3) *Negotiable and Nonnegotiable Documents.* U.C.C. 7104 was amended in 2006. Under the amended version of the statute, a document of title is negotiable if by its terms the goods are to be delivered to the bearer or to the order of a named person (U.C.C. 7104(a)), unless, at the time it is issued, the document has a conspicuous legend, "however expressed, that it is nonnegotiable" (U.C.C. 7104(c)). Any other document is nonnegotiable, and a bill of lading stating that the goods are consigned to a named person is not made negotiable by a provision that the goods are to be delivered only against "an order in a record signed by the same or another named person." (U.C.C. 7104(b).)



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E. Transfer of Document of Title.
2. Effect of Transfer of Negotiable Document.

4 Witkin Sum. Cal. Law Sales § 139

[§ 139] Effect of Transfer of Negotiable Document.

(1) *Negotiation*. A document of title is "duly negotiated" when it is negotiated in the manner provided in U.C.C. 7501(1), (2), (3) to a good faith purchaser for value and without notice of any defense against or claim to it. (U.C.C. 7501(4).) That portion of the Official Text which denies the status of a bona fide purchaser to a holder where the negotiation was not in the regular course of business or financing or where the document was received in settlement or payment of a money obligation, was eliminated from the California Code. (See 2C U.L.A. (Master Ed.), §7-501.)

(2) *Liabilities of Transferor*. In most instances the transferor of a negotiable document, by indorsement or delivery, makes certain warranties as to the genuineness of the document and his or her right to negotiate it (see *supra*, §54). But the indorser is not a guarantor; i.e., indorsement of a document issued by a bailee does not make the indorser liable for defaults of the bailee or of previous indorsers. (See U.C.C. 7505, and Official Comment.) This differs, of course, from the negotiable instruments rule, the general indorser of a negotiable instrument being liable absolutely to a holder in due course for nonpayment by the maker or drawer, if there is due presentment and notice of dishonor. (See 4 *Summary* (10th), *Negotiable Instruments*, §49.)

(3) *Title of Transferee: Mercantile Theory*. When a negotiable document has been "duly negotiated," the rights of the holder "are not impaired even though the negotiation or any prior negotiation constituted a breach of duty or even though any person has been deprived of possession of the document by misrepresentation, fraud, accident, mistake, duress, loss, theft or conversion, or even though a previous sale or other transfer of the goods or document has been made to a third person." (U.C.C. 7502(2), and see Official Comment 4; for exceptions, see U.C.C. 7503, 7205.) Thus, the holder of a negotiable document of title may acquire rights to the goods superior to those of his or her transferor. This is the "mercantile theory" of full negotiability. (See generally U.C.C. 7501, Official Comments 1, 2; 5 *Cal. L. Rev.* 478; 9 *Cal. L. Rev.* 40.)

(4) *Rights of Creditors of Owner*. If goods have been properly deposited with a bailee and a negotiable document of title issued for them, the goods are not subject to lien by virtue of any judicial process unless the document is surrendered to the bailee or its negotiation is enjoined. The bailee cannot be compelled by process to deliver the goods until the document is surrendered to the bailee or impounded by the court. However, a purchaser of the document for value and without notice of the process or injunction takes free of the lien. (See U.C.C. 7602, and Official Comments; 7A *Anderson* 3d (1995 Rev. ed.), §7-602:5 et seq.; 78 *Am.Jur.2d* (1975 ed.), *Warehouses* §107; cf. U.C.C. 7504(2)(a))

[rights of creditors where document is nonnegotiable].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Negotiation*. U.C.C. 7501 was repealed and replaced by a similar statute in 2006. Under U.C.C. 7501(a), a document of title is duly negotiated if it is negotiated in one of four specified ways to "a holder that purchases it in good faith, without notice of any defense against or claim to it on the part of any person, and for value." However, it is not duly negotiated if "the negotiation is not in the regular course of business or financing or involves receiving the document in settlement or payment of a monetary obligation." U.C.C. 7501(b) sets forth special rules applicable to a negotiable electronic document of title. (3) *Title of Transferee: Mercantile Theory*. U.C.C. 7502 was repealed and replaced by a similar statute in 2006. Under U.C.C. 7502(b), the title and rights acquired by due negotiation "are not defeated by any stoppage of the goods represented by the document of title or by surrender of the goods by the bailee and are not impaired," even if (a) the due negotiation or any prior negotiation constituted a breach of duty, (b) any person has been deprived of possession of a negotiable tangible document or control of a negotiable electronic document by misrepresentation, fraud, accident, mistake, duress, loss, theft, or conversion, or (c) a previous sale or other transfer of the goods or document has been made to a third person.

(4) *Rights of Creditors of Owner*. U.C.C. 7504 was repealed and replaced by a similar statute in 2006. U.C.C. 7504(2)(a), on the rights of creditors where the document is nonnegotiable, is now U.C.C. 7504(b)(1).



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CHAPTER V - Sales

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VI. PERFORMANCE

A. In General.

1. Identification of Goods to Contract.

4 Witkin Sum. Cal. Law Sales § 140

[§ 140] Identification of Goods to Contract.

Identification is the act of designating particular goods as the subject matter of the contract. Identification is ordinarily unambiguous and doubts should be resolved by concluding that identification has occurred. (See U.C.C. 2501, Official Comment 2; see generally C.E.B., 1 UCC Sales and Leases, §8.28 et seq.; 3A Anderson 3d (2002 Rev. ed.), §2-501:6 et seq.) Goods may be identified "at any time and in any manner explicitly agreed to by the parties." (U.C.C. 2501(1), and see Official Comment 3.) In the absence of an explicit agreement, identification occurs as follows:

(1) *Goods "already existing and identified"* are identified when the contract is made. (U.C.C. 2501(1)(a).)

(2) *Future goods* other than unborn young or future crops are identified when the seller ships, marks, or otherwise designates goods as those to which the contract refers. (U.C.C. 2501(1)(b); see 3A Anderson 3d (2002 Rev. ed.), §2-501:31 et seq.)

(3) *Unborn young of animals or future crops* are identified when the young are conceived or the crops are planted or otherwise become growing crops. (U.C.C. 2501(1)(c); cf. 1B U.L.A. (Master Ed.), §2-501(1)(c) [Official Text limits identification to 12 months or next harvest season after contracting].)

Where the seller alone makes the identification, he or she may substitute other goods for goods that have already been so identified "until default or insolvency or notification to the buyer that the identification is final." (U.C.C. 2501(2).)

SUPPLEMENT: [This section is current through the latest supplement]



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VI. PERFORMANCE

A. In General.

2. Insurable Interest and Special Property.

4 *Witkin Sum. Cal. Law Sales* § 141

[§ 141] Insurable Interest and Special Property.

(1) *Insurable Interest*. The buyer obtains an insurable interest on identification of goods, whether or not they are conforming and even if the buyer has an option to return or reject them. (U.C.C. 2501(1).) The seller also has an insurable interest "so long as title to or any security interest in the goods remains in him." (U.C.C. 2501(2).) These interests provided for in the Commercial Code are in addition to any insurable interests "recognized under any other statute or rule of law." (U.C.C. 2501(3); see *Ins.C. 281* et seq.; see also *Ins.C. 280* [insurable interest necessary to validity of insurance contract]; C.E.B., 1 UCC Sales and Leases, §8.30.)

(2) *Buyer's Special Property*. The buyer obtains a "special property" on identification of existing goods. (U.C.C. 2501(1); see U.C.C. 2401, Official Comment 3.) This special property entitles the buyer to recover the goods from an insolvent seller under certain conditions. (See *infra*, §142.)

SUPPLEMENT: [This section is current through the latest supplement]



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VI. PERFORMANCE

A. In General.

3. Recovery of Goods From Insolvent Seller.

4 Witkin Sum. Cal. Law Sales § 142

[§ 142] Recovery of Goods From Insolvent Seller.

Even if the goods have not been shipped, a buyer who has paid part or all of the price and has a special property under U.C.C. 2501 (supra, §141) may, on making and keeping good a tender of any unpaid portion of the price, recover the goods from the seller in either of the following cases:

(1) The goods were bought for personal, family, or household purposes and the seller repudiates or fails to deliver as required by the contract. (U.C.C. 2502(1)(a).) Under U.C.C. 2502(1)(a), the buyer's right to recover vests upon acquisition of a special property, even if the seller had not, at that point, repudiated or failed to deliver. (U.C.C. 2502(2).)

(2) The seller becomes insolvent within 10 days after receipt of the first installment on the price. (U.C.C. 2502(1)(b), and see Official Comment 1; C.E.B., 2 UCC Sales and Leases, §17.76 et seq.)

If the buyer has made the identification creating his or her special property, the buyer acquires the right to recover the goods only if they conform to the contract for sale. (U.C.C. 2502(3), and see Official Comment 4.)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Seller's Tender or Delivery.

1. In General.

4 Witkin Sum. Cal. Law Sales § 143

[§ 143] In General.

(1) *Goods*. Delivery is properly tendered when the seller (a) puts and holds conforming goods at the buyer's disposition, and (b) gives the buyer "any notification reasonably necessary to enable him to take delivery." (U.C.C. 2503(1); see generally C.E.B., 1 UCC Sales and Leases, §9.44 et seq.; 67 *Am.Jur.2d* (2003 ed.), *Sales* §489 et seq.) These requirements apply when the seller is required to make delivery at a particular destination. (U.C.C. 2503(3); on tender in shipment contracts, see *infra*, §144.) The manner, time, and place for tender are determined by agreement and by the provisions of the Code. (U.C.C. 2503(1); see *supra*, §§48, 49.) Tender must be at a reasonable hour, and goods tendered "must be kept available for the period reasonably necessary to enable the buyer to take possession." (U.C.C. 2503(1)(a), and see Official Comment 3.) The buyer must furnish facilities for receipt of the goods unless otherwise agreed. (U.C.C. 2503(1)(b).)

(2) *Documents*. Documents must be tendered "in correct form." Tender may be made through customary banking channels. (U.C.C. 2503(5), and see Official Comment 7; on tender of bill of lading in a set in overseas shipments, see *supra*, §119.) When goods in the possession of a bailee are to be delivered without being moved, the seller may either tender a negotiable document of title or procure the bailee's acknowledgment of the buyer's right to the goods. (U.C.C. 2503(4)(a); see 3A Anderson 3d (2002 Rev. ed.), §2-503:28 et seq.; 4 *A.L.R.2d* 213 [acknowledgment by bailee].) The seller may also tender a nonnegotiable document of title or give the bailee written direction to deliver, unless the buyer seasonably objects. (U.C.C. 2503(4)(b); see C.E.B., 1 UCC Sales and Leases, §9.46.)

When the document is one against which a draft is drawn, unless otherwise agreed the drawee is entitled to delivery on acceptance of the draft if it is payable more than 3 days after presentment; otherwise, the drawee is entitled to receive the document only on payment. (U.C.C. 2514; see 4 Anderson 3d (1997 Rev. ed.), §2-514:3 et seq.)

West's Key Number Digest, Sales k.153

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Goods*. See C.E.B., Law of Contracts §8.49.

(2) *Documents*. U.C.C. 2503(4)(b), as amended in 2006, refers to a "nonnegotiable document of title" or a "record directing the bailee to deliver."

4 Witkin Sum. Cal. Law Sales § 143

See 4 Lawrence's Anderson 3d (2006 ed.), §2-514:3 et seq.



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B. Seller's Tender or Delivery.

2. Shipment by Seller.

4 Witkin Sum. Cal. Law Sales § 144

[§ 144] Shipment by Seller.

When the contract requires or authorizes the seller to send the goods to the buyer but does not require the seller to deliver them to a particular destination (see *supra*, §117), unless otherwise agreed, the seller must:

(1) Place the goods in the carrier's possession and contract for their transportation in a manner consistent with the nature of the goods and other relevant circumstances. (U.C.C. 2504(a), and see Official Comment 3.)

(2) Obtain and promptly deliver or tender to the buyer any documents in due form that are necessary to enable the buyer to obtain possession of the goods or that are otherwise required by the agreement or usage of trade. (U.C.C. 2504(b), and see Official Comment 4.)

(3) Promptly notify the buyer that the goods have been shipped. (U.C.C. 2504(c), and see Official Comment 5.)

Failure of the seller to properly contract for carriage of the goods or to notify the buyer of shipment are grounds for rejection "only if material delay or loss ensues." (U.C.C. 2504, and see Official Comments 5, 6; 3A Anderson (2002 Rev. ed.), §2-504:11 et seq.; as to seller's right to effect alternative delivery when the stipulated requirements are impracticable, see *infra*, §174.)

SUPPLEMENT: [This section is current through the latest supplement]
See C.E.B., Law of Contracts §8.50.



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B. Seller's Tender or Delivery.

3. Shipment Under Reservation.

4 *Witkin Sum. Cal. Law Sales* § 145

[§ 145] Shipment Under Reservation.

A seller who has identified goods to the contract by or before shipment may retain a security interest in them by *shipment under reservation*. (See *supra*, §131.) Shipment may be made under reservation unless the contract provides otherwise, e.g., by requiring the seller to extend credit. (See U.C.C. 2310(b), and Official Comment 2.) Where shipment under reservation is in violation of the contract, it constitutes an improper shipment. (U.C.C. 2505(2).) But unauthorized reservation of a security interest does not impair the buyer's rights after shipment of identified goods or the seller's powers with respect to a negotiable document. (See U.C.C. 2505(2), and see Official Comment 5; C.E.B., 1 UCC Sales and Leases, §9.10 et seq.)

West's Key Number Digest, Sales k.153

SUPPLEMENT: [This section is current through the latest supplement]

U.C.C. 2505(2) was amended in 2006 to add the words "of title" after "negotiable document."

See C.E.B., Law of Contracts §8.51.



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B. Seller's Tender or Delivery.

4. Delivery on Condition.

4 Witkin Sum. Cal. Law Sales § 146

[§ 146] Delivery on Condition.

Where payment is due on delivery and the goods or documents are delivered with a demand for payment, the buyer's "right as against the seller to retain or dispose of them is conditional upon his making the payment due." (U.C.C. 2507(2), and see Official Comment 3; see also 3A Anderson 3d (2002 Rev. ed.), §2-507:10; C.E.B., 1 UCC Sales and Leases, §§9.12, 10.67; on buyer's *power* to dispose of goods without making payment, see U.C.C. 2505, Official Comment 4.)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Seller's Tender or Delivery.

5. Cure of Improper Tender or Delivery.

4 Witkin Sum. Cal. Law Sales § 147

[§ 147] Cure of Improper Tender or Delivery.

The seller's obligation is to make a *perfect tender*; the buyer may reject if "the goods or the tender of delivery fail in any respect to conform to the contract." (U.C.C. 2601; see *infra*, §159.) But the harshness of this rule is mitigated by U.C.C. 2508, which allows the seller to "cure" some defects after rejection. (See 3A Anderson 3d (2002 Rev. ed.), §2-508:7 et seq.; C.E.B., *Breach of Contract Remedies*, §3.96 et seq.; C.E.B., 1 UCC Sales and Leases, §9.62 et seq.; 91 *Harv. L. Rev.* 960 [breach and remedy for tender of nonconforming goods]; 10 *U.C.L.A. L. Rev.* 1191; 36 *A.L.R.4th* 544; for buyer's obligation to state curable defects when rejecting, see *infra*, §162.)

When the time for performance has not expired, any defect may be cured. The seller may "seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery." (U.C.C. 2508(1), and see Official Comment 1.)

After a surprise rejection, the seller may cure even though the time for performance has expired. If the buyer rejects a nonconforming tender "which the seller had reasonable grounds to believe would be acceptable with or without money allowance," the seller may seasonably notify the buyer of an intent to cure and thereby acquire "further reasonable time to substitute a conforming tender." (U.C.C. 2508(2), and see Official Comments 2, 3.)

The seller's right to cure under U.C.C. 2508 exists only where the buyer seeks to reject acceptance of the goods, not where the buyer seeks to revoke acceptance. (*United States Roofing v. Credit Alliance Corp.* (1991) 228 *C.A.3d* 1431, 1443, 1444, 279 *C.R.* 533; on seller's right to cure where there is revocation of acceptance, see U.C.C. 2608, *infra*, §§167, 168.)

West's Key Number Digest, Sales k.153

SUPPLEMENT: [This section is current through the latest supplement]
See C.E.B., *Law of Contracts* §8.53.



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B. Seller's Tender or Delivery.

6. Merchandise to Consumer.

4 Witkin Sum. Cal. Law Sales § 148

[§ 148] Merchandise to Consumer.

(1) *In General.* Where a retailer with 25 or more employees enters into a contract with a consumer for the sale of merchandise to be delivered at a later date while the consumer is present, the retailer and consumer must agree (at the time of sale or a later date prior to delivery) on a 4-hour period within which delivery must be made. Similarly, where a retailer with 25 or more employees enters into a contract with a consumer for *service or repair* of merchandise (whether or not sold by the retailer) that is to take place while the consumer is present, and the retailer receives a request for service or repair, the retailer and consumer must agree, prior to the date of service or repair, on a 4-hour period within which the service or repair will be commenced. (C.C. 1722(a)(1).)

(2) *Consumer's Remedies.* A consumer may bring a small claims action against a retailer for lost wages, expenses, or other actual damages not exceeding \$ 600, where the merchandise is not delivered, or service or repair is not commenced, within the specified period (except for delays caused by unforeseen or unavoidable occurrences beyond the retailer's control). (C.C. 1722(a)(2).) An action is not valid unless the consumer was present during the specified period. (C.C. 1722(a)(3).)

(3) *Defenses.* The retailer may raise as a defense (a) a diligent attempt to notify the consumer of a delay caused by unforeseen or unavoidable occurrences beyond the retailer's control; or (b) the retailer's inability to notify the consumer of the delay because of the consumer's absence or unavailability during the period, where, in either instance, the retailer makes the delivery, service, or repairs within 2 hours of a newly agreed upon time, or the consumer unreasonably declines to arrange a new time. (C.C. 1722(a)(5).)

(4) *Waiver or Modification of Rights.* Any provision of a delivery, service, or repair contract in which the consumer agrees to modify or waive the rights afforded by C.C. 1722 is contrary to public policy and void. (C.C. 1722(d).)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Inspection of Goods.

1. Right To Inspect.

4 Witkin Sum. Cal. Law Sales § 149

[§ 149] Right To Inspect.

The buyer is entitled to inspect the goods before payment or acceptance, unless the buyer has agreed to delivery terms that preclude inspection or has otherwise agreed to relinquish the right. (U.C.C. 2513(1), (3); on payment before inspection, see *infra*, §157.) But required payment before inspection does not constitute an acceptance (U.C.C. 2512(2)), and "no agreement by the parties can displace the entire right of inspection except where the contract is simply for the sale of 'this thing.' " (U.C.C. 2513, Official Comment 1; see U.C.C. 2512, Official Comments 5, 6; C.E.B., *Breach of Contract Remedies*, §3.89; C.E.B., 1 UCC Sales and Leases, §10.4 et seq.)

The buyer's right to inspect goods prior to acceptance is a basic right to ensure that the goods that have been identified to the contract do in fact conform to it. It is distinguishable from any examination of goods during negotiations (see *supra*, §80), which is relevant only to the exclusion or limiting of warranties under the contract. (See U.C.C. 2513, Official Comment 9; C.E.B., 1 UCC Sales and Leases, §10.3; 36 *A.L.R.4th* 726 [time, place, and manner of buyer's inspection of goods under Unif.Com.C. §2-513]; 67 *Am.Jur.2d* (2003 ed.), *Sales* §560 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]
See C.E.B., *Law of Contracts* §8.56.



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C. Inspection of Goods.

2. Procedure.

4 *Witkin Sum. Cal. Law Sales* § 150

[§ 150] Procedure.

The buyer may inspect the goods after tender, delivery, or identification. (See U.C.C. 2513(1), and Official Comment 2.) The right may be exercised "at any reasonable place and time and in any reasonable manner" (U.C.C. 2513(1)), including the place of arrival of shipped goods (see U.C.C. 2513, Official Comment 3). In *Square Deal Machine Co. v. Garrett Corp.* (1954) 128 C.A.2d 286, 275 P.2d 46, decided under former C.C. 1767 (authorizing a "reasonable opportunity" for inspection), plaintiff bought a "36-tooth" gear to make elevating screws, and defendant negligently furnished a 35-tooth gear. Plaintiff installed the gear on its lathe and manufactured 166 pieces during 15 days of operation before discovering the mistake. *Held*, judgment for damages affirmed. Defendant's contention that the goods should have been inspected as soon as offered was rejected; the buyer has a reasonable time to make the examination, given regard to the nature of the goods and all the circumstances. (128 C.A.2d 291.)

The parties may agree to a place or method of inspection. Such a stipulation is presumed to provide exclusively for inspection, and, unless expressly agreed, it does not affect identification, passage of risk of loss, or the place of delivery. (See U.C.C. 2513(4); C.E.B., 1 UCC Sales and Leases, §10.9 et seq.) If compliance with the stipulation becomes impossible, the buyer is entitled to inspection under the general provisions of U.C.C. 2513, unless the stipulation "was clearly intended as an indispensable condition failure of which avoids the contract." (U.C.C. 2513(4), and see Official Comment 6.)

Expenses incurred in making the inspection must be assumed by the buyer. However, if the goods are nonconforming and rejected, the expenses are recoverable as incidental damages. (U.C.C. 2513(2), and Official Comment 4; see U.C.C. 2715, *infra*, §206.)

West's Key Number Digest, Sales k.68(1)

SUPPLEMENT: [This section is current through the latest supplement]



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D. Risk of Loss.

1. Pre-Code Title Theory.

4 Witkin Sum. Cal. Law Sales § 151

[§ 151] Pre-Code Title Theory.

Under pre-Code law, unless otherwise agreed, the risk of loss ordinarily followed the title; i.e., the loss fell upon the party who was the owner of the goods at the time of their accidental destruction. This rule applied regardless of the delivery of the goods. (See former C.C. 1742; *Capitain v. L.A. Wrecking Co. (1951)* 37 C.2d 527, 528, 233 P.2d 544.) So, where there was an executory contract to sell, and the property was destroyed, the buyer was no longer obligated to pay the price and could rescind for failure of consideration. (See *McKinney v. Sargent (1932)* 216 C. 18, 20, 13 P.2d 373.)

On the other hand, where the transaction was executed, and title had passed, the risk of loss was shifted to the buyer, and the seller could enforce payment even if the property had been destroyed and could not be delivered. (See *J.S. Potts Drug Co. v. Benedict (1909)* 156 C. 322, 334, 104 P. 432.)

Early California cases carried the "risk follows title" rule to its extreme by applying it to *conditional sales*, so that, even when the possession and beneficial use of the goods had passed to the buyer, the risk of loss was still on the seller. (*Wyman v. Security Ins. Co. of Calif. (1927)* 202 C. 743, 745, 262 P. 329; 3 Cal. L. Rev. 166; 1 So. Cal. L. Rev. 302.) The Sales Act changed this result by shifting risk of loss to the buyer where goods were delivered and title was retained by the seller "merely to secure performance by the buyer of his obligations under the contract." (See former C.C. 1742(a); *Beaudry v. Peterson (1942)* 50 C.A.2d 478, 483, 123 P.2d 108.)

SUPPLEMENT: [This section is current through the latest supplement]



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D. Risk of Loss.

2. Commercial Code.

a. Contractual Approach.

4 Witkin Sum. Cal. Law Sales § 152

[§ 152] Contractual Approach.

The Commercial Code takes a radically different approach to the issue of risk of loss consistent with the de-emphasis of the concept of title generally (see *supra*, §124). The Code's approach is based on the contractual duties undertaken by the parties "rather than an arbitrary shifting of the risk with the 'property' in the goods." (See U.C.C. 2509, Official Comment 1; 27 *Pacific L. J.* 161 [history of U.C.C. risk of loss provisions and discussion of revision efforts]; 20 *U.C.L.A. L. Rev.* 1352; 3A Anderson 3d (2002 Rev. ed.), §2-509:3 et seq.; C.E.B., 2 UCC Sales and Leases, §16.40 et seq.; 66 *A.L.R.3d* 145 [who bears risk of loss of goods under Unif.Com.C. §§2-509, 2-510]; 67 *Am.Jur.2d* (2003 ed.), *Sales* §378 et seq.)

The provisions allocating risk of loss are subject to contrary agreement of the parties (U.C.C. 2509(4)), and that agreement may shift the allocation or divide the risk (U.C.C. 2303).

SUPPLEMENT: [This section is current through the latest supplement]



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D. Risk of Loss.

2. Commercial Code.

b. In the Absence of Breach.

4 *Witkin Sum. Cal. Law Sales* § 153

[§ 153] In the Absence of Breach.

(1) *Destination Contract*. If the contract requires or authorizes the seller to ship the goods by carrier and to deliver them at a particular destination, as in an F.O.B. contract (*supra*, §§115, 116), and the goods are duly tendered at that destination while in the carrier's possession, "the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery." (U.C.C. 2509(1)(b), and see Official Comment 3; C.E.B., 2 UCC Sales and Leases, §§16.42, 16.43; 20 *U.C.L.A. L. Rev.* 1352.)

(2) *Shipment Contract*. If the contract requires or authorizes the seller to arrange only for shipment, as in a C.I.F. contract (*supra*, §§117, 118), the risk of loss passes to the buyer when the goods are duly delivered to the carrier for shipment. (U.C.C. 2509(1)(a), and see Official Comment 2; C.E.B., 2 UCC Sales and Leases, §§16.42, 16.43; 20 *U.C.L.A. L. Rev.* 1352.) This rule applies even if the seller ships under reservation. (U.C.C. 2509(1)(a); see U.C.C. 2505; *supra*, §145.)

(3) *Goods Held by Bailee*. If the goods are held by a bailee and are to be delivered without being moved, the shifting of risk of loss parallels the requirements of tender under U.C.C. 2503(4) (see *supra*, §143). The risk of loss shifts to the buyer (a) when the buyer receives a negotiable document of title, (b) when the bailee acknowledges the buyer's right to possession of the goods, or (c) after the buyer's receipt of a nonnegotiable document of title or other written direction to deliver. (See U.C.C. 2509(2), and Official Comment 4; C.E.B., 2 UCC Sales and Leases, §16.44; 20 *U.C.L.A. L. Rev.* 1352.)

(4) *Other Situations*. In any sale not covered by one of the above rules, "the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery." (U.C.C. 2509(3); see C.E.B., 2 UCC Sales and Leases, §16.45; 20 *U.C.L.A. L. Rev.* 1352.)

West's Key Number Digest, Sales k.150(2)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Goods Held by Bailee*. As amended in 2006, U.C.C. 2509(2) provides that the risk of loss shifts (a) on the buyer's receipt of possession or control of a negotiable document of title covering the goods; (b) on acknowledgment by the

bailee of the buyer's right to possession of the goods; or (c) after the buyer's receipt of possession or control of a nonnegotiable document of title or other direction to deliver in a record as provided in U.C.C. 2503(4)(b) (text, §143).



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D. Risk of Loss.

2. Commercial Code.

c. Effect of Breach.

4 *Witkin Sum. Cal. Law Sales* § 154

[§ 154] Effect of Breach.

An assessment of risk of loss based on the parties' contractual obligations is only applicable when those obligations are properly discharged. (See U.C.C. 2509(4), and Official Comment 1; C.E.B., 2 UCC Sales and Leases, §16.48 et seq.) After a breach of contract, risk of loss is subject to the following rules:

(1) *Rightful Rejection of Goods*. Where a tender or delivery is nonconforming and the buyer rightfully rejects, the risk of loss remains with the seller until the seller cures the nonconformity (supra, §147), or until acceptance. (U.C.C. 2510(1), and see Official Comments 1, 2.)

(2) *Rightful Revocation of Acceptance of Goods*. A buyer who has rightfully revoked acceptance of goods may treat the risk of loss as having rested on the seller throughout to the extent of any deficiency in the buyer's effective insurance coverage. (U.C.C. 2510(2).)

(3) *Breach by Buyer*. Where a contract is breached by the buyer after conforming goods have been identified to the contract but before the risk of loss has shifted to the buyer, the seller may, to the extent of any deficiency in his or her effective insurance coverage, treat the risk of loss as resting on the buyer for a commercially reasonable time. (U.C.C. 2510(3); see 4 Anderson 3d (1997 Rev. ed.), §2-510:19 et seq.)

(4) *"Effective Insurance Coverage."* This qualification is intended to limit an aggrieved party's recovery to loss not covered by that party's insurance or to a loss that is not compensated for due to supervening insolvency of the insurer. U.C.C. 2510 "merely distributes the risk of loss as stated and is not intended to be disturbed by any subrogation of an insurer." (See U.C.C. 2510, Official Comment 3.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Breach by Buyer*. See 4 Lawrence's Anderson 3d (2006 ed.), §2-510:17 et seq.



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VI. PERFORMANCE
E. Payment by Buyer.
1. In General.

4 *Witkin Sum. Cal. Law Sales* § 155

[§ 155] In General.

(1) *Buyer's Obligation*. "Unless otherwise agreed, tender of payment is a condition to the seller's duty to tender and complete any delivery." (U.C.C. 2511(1), and see Official Comments 1, 2; as to construction of payment terms, see *supra*, §50; on concurrent conditions generally, see 1 *Summary* (10th), *Contracts*, §792.)

(2) *Sufficiency of Tender*. The buyer's tender of payment is sufficient if it is made "by any means or in any manner current in the ordinary course of business." (U.C.C. 2511(2); as to substitution for agreed means of payment, see *infra*, §174; as to payment by check, see *infra*, §156.) Dishonor of a draft accompanying documents is a rejection or nonacceptance of the delivery. (See U.C.C. 2503(5)(b).)

(3) *Letters of Credit*. Delivery to the seller of a proper letter of credit suspends the buyer's obligation to pay. But the seller may, upon seasonable notification, demand payment directly from the buyer if the letter of credit is dishonored. (U.C.C. 2325(2); see C.E.B., 1 UCC Sales and Leases, §10.61.) And the failure of the buyer to seasonably deliver an agreed letter of credit is a breach of the contract for sale. (U.C.C. 2325(1).) (On letters of credit generally, see 4 *Summary* (10th), *Negotiable Instruments*, §136 et seq.)

Use of the term "letter of credit" or "banker's credit" in a sales contract requires that an irrevocable credit be issued by a finance company of good repute, or, if the shipment is overseas, of good international repute. A provision for "confirmed credit" requires that the credit also carry the direct obligation of an agency that does business in the seller's financial market. (U.C.C. 2325(3), and see Official Comments 2, 3.)

West's Key Number Digest, Sales k.183

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Buyer's Obligation*. See C.E.B., Law of Contracts §8.54.(2) *Sufficiency of Tender*. U.C.C. 2503(5)(b) was amended in 2006 to refer both to a draft "accompanying" the documents and to a draft "associated with" the documents.



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E. Payment by Buyer.

2. Payment by Check.

4 Witkin Sum. Cal. Law Sales § 156

[§ 156] Payment by Check.

Payment by check is an accepted commercial practice that the Code recognizes by approving tender in any manner current in the ordinary course of business. (U.C.C. 2511(2), *supra*, §155; see 4 Anderson 3d (1997 Rev. ed.), §2-511:12 et seq.; C.E.B., 1 UCC Sales and Leases, §10.59.) Such payment *may be rejected* by the seller, but a seller who demands legal tender must give any extension of time reasonably necessary for the buyer to procure it. (See U.C.C. 2511(2), and Official Comment 3.)

Payment by check is *conditional*. Thus, the payment "is defeated as between the parties by dishonor of the check on due presentment." (U.C.C. 2511(3), and see Official Comment 4 et seq.) This provision is subject to the provisions of Division 3 respecting payment by check. (See U.C.C. 3310; 4 *Summary* (10th), *Negotiable Instruments*, §18.)

In *Citizens Bank of Roseville v. Taggart* (1983) 143 C.A.3d 318, 191 C.R. 729, T bought an automobile from Braxton Motor Co., seller, giving a bad check in payment. Plaintiff bank sued T on unpaid promissory notes, and levied execution on the automobile. The seller filed a third-party claim. *Held*, the bank's claim was subordinate to that of the seller.

(a) The right of a cash seller to reclaim goods sold in a "bad check" transaction is not specifically treated in the Code. But it has been held to be inherent in U.C.C. 2507(2) (*supra*, §146) and U.C.C. 2511(3). These provisions, construed together, evidence a legislative intent that the buyer cannot retain and the seller has a right to reclaim goods sold in a cash transaction if the buyer's check is dishonored. (143 C.A.3d 320.)

(b) U.C.C. 2702 does expressly give a reclamation right to a *credit seller*, on demand made within 10 days (U.C.C. 2702(2), *infra*, §186). The 10-day limitation has been applied to a *cash seller* in some cases, but these decisions have been criticized, and the better view, accepted here, is *contra*. (143 C.A.3d 321, 322, 323.)

(c) The Code thus supports the right of the cash seller to reclaim the goods from the buyer, but does not solve the priority problem as between a lien creditor and the cash seller. U.C.C. 2403 (*supra*, §136) gives a *bona fide purchaser* a good title, but the lien creditor's rights must be determined under U.C.C. 1103 (*supra*, §12) by the common law. And the common law rule gives the unpaid cash seller priority over a lien creditor. (143 C.A.3d 325.) This rule is particularly appropriate here, for the bank did not give value *for the automobile*, and did not, in making its loans, rely on the

ostensible ownership or voidable title of *T.* (143 C.A.3d 325.) (See 27 U.C. Davis L. Rev. 713 [origin of cash seller's right to reclaim under U.C.C. 2507].)

SUPPLEMENT: [This section is current through the latest supplement]
See 4 Lawrence's Anderson 3d (2006 ed.), §2-511:13 et seq.



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E. Payment by Buyer.

3. Payment Before Inspection.

4 *Witkin Sum. Cal. Law Sales* § 157

[§ 157] Payment Before Inspection.

(1) *When Required.* Normally the buyer may inspect the goods before paying for them. (See *supra*, §149.) But this is not the case where the contract calls for delivery "C.O.D.," for payment against documents, or otherwise provides for a delivery that requires the buyer to pay prior to inspection, or where inspection is not feasible under a C.I.F. contract (see *supra*, §117). (U.C.C. 2513(3).)

(2) *Payment for Nonconforming Delivery.* If the contract requires the buyer to pay before inspecting the goods, the buyer must make payment even though the goods are nonconforming unless "the nonconformity appears without inspection," or "despite tender of the required documents the circumstances would justify injunction against honor under this code." (U.C.C. 2512(1), and see Official Comment 1; but see C.E.B., 1 UCC Sales and Leases, §10.58 [questioning the seller's power to enforce the provision where a buyer has been alerted to a nonconformity]; see also U.C.C. 5109 [procedure where forged or fraudulent documents are presented]; 4 *Summary* (10th), *Negotiable Instruments*, §141.) Even though a buyer may be required to pay for nonconforming goods by U.C.C. 2512(1), the right to inspect them subsequently and to reject the delivery or pursue any other remedy remains. (U.C.C. 2512(2).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *When Required.* See C.E.B., Law of Contracts §8.55.



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F. Preserving Evidence.

4 Witkin Sum. Cal. Law Sales § 158

[§ 158] Preserving Evidence.

Either party to the sale may "inspect, test and sample the goods" after a claim or dispute has arisen. The inspection may take place even though the goods are in the possession of the other party. Reasonable notice must be given and the inspection must be "for the purpose of ascertaining the facts and preserving evidence." (U.C.C. 2515(a), and see Official Comment 1.) The parties may agree to an inspection of the goods by a third party and may agree that the third party's findings as to the conformity or condition of the goods will be binding in any litigation or adjustment. (See U.C.C. 2515(b), and Official Comment 3; C.E.B., 2 UCC Sales and Leases, §16.79 et seq.; Cal. Transactions Forms, 4 Business Transactions §24:369.)

Exercise of the right of inspection accorded by U.C.C. 2515(a) does not constitute an act of acceptance under U.C.C. 2606 (see *infra*, §165) or an act inconsistent with the ownership of the other party. (See generally U.C.C. 2515, Official Comment 2; *10 U.C.L.A. L. Rev.* 1202; C.E.B., 2 UCC Sales and Leases, §16.79.)

SUPPLEMENT: [This section is current through the latest supplement]
See C.E.B., Law of Contracts §8.57.



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VII. BREACH, REPUDIATION, AND EXCUSE
A. Buyer's Rights on Improper Delivery.
1. Delivery in Single Lot.

4 Witkin Sum. Cal. Law Sales § 159

[§ 159] Delivery in Single Lot.

(1) *Perfect Tender Required.* When goods are delivered in a single lot (see supra, §27), the Commercial Code requires a perfect tender; the buyer may reject "if the goods or the tender of delivery *fail in any respect* to conform to the contract." (U.C.C. 2601; see 11 U.C.L.A. L. Rev. 78; C.E.B., 1 UCC Sales and Leases, §9.51; 67 Am.Jur.2d (2003 ed.), Sales §590; 24 Proof of Facts 224 [buyer's defenses]; 37 Proof of Facts 2d 681 [buyer's dissatisfaction with goods].) The rule of perfect tender does not apply where delivery is in installments (see infra, §160), or where the parties have otherwise agreed to limit remedies pursuant to U.C.C. 2718, 2719 (see infra, §211). (U.C.C. 2601.) And the effect of the rule is further limited by the seller's right to cure. (See supra, §147.)

(2) *Partial Acceptance.* As an alternative to rejecting the whole delivery (U.C.C. 2601(a)), the buyer may accept one or more commercial units (see supra, §27) and reject the rest without impairing any remedy with respect to the rejected portion of the goods that he or she would otherwise have available. (U.C.C. 2601(c), and see Official Comment 1.)

Partial acceptance under the Code is a significant change from the Sales Act. Former C.C. 1764 only authorized the buyer to separate conforming and nonconforming goods and reject the latter. The buyer under the Code can select and accept *any* commercial unit or units, whether or not the goods accepted conform, but the buyer must act in good faith and with commercial reasonableness to "avoid undue impairment of the value of the remaining portion of the goods." (Official Comment 1; see 4 Anderson 3d (1997 Rev. ed.), §2-601:26 et seq.; C.E.B., 1 UCC Sales and Leases, §10.20; 41 A.L.R.4th 396.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Perfect Tender Required.* See C.E.B., Law of Contracts §8.52.(2) *Partial Acceptance.* See 4 Lawrence's Anderson 3d (2006 ed.), §2-601:24.



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A. Buyer's Rights on Improper Delivery.
2. Delivery in Installments.

4 *Witkin Sum. Cal. Law Sales* § 160

[§ 160] Delivery in Installments.

(1) *Installment Contract.* Normally, all goods subject to a contract for sale must be tendered in a single delivery. (See U.C.C. 2307.) The contract may, however, require or authorize that the goods be delivered "in separate lots to be separately accepted." This is an installment contract even if it contains a clause, "each delivery is a separate contract," or its equivalent. (U.C.C. 2612(1), and see Official Comments 2, 3; see also 4 Anderson 3d (1997 Rev. ed.), §2-612:8 et seq.; C.E.B., 1 UCC Sales and Leases, §9.54; on installment contracts under the Code generally, see 67 *Am.Jur.2d* (2003 ed.), *Sales* §617 et seq.) The circumstances of the sale may also support this characterization even in the absence of an explicit term. (See U.C.C. 2612, Official Comment 1; U.C.C. 2307, and Official Comment 3; C.E.B., 1 UCC Sales and Leases, §9.54.)

(2) *Nonconformity Justifying Rejection of Installment.* Where the nonconformity affects only the delivered installment of an installment contract, the buyer may reject only if: (a) the documents are defective; or (b) "the nonconformity substantially impairs the value of that installment and cannot be cured." (U.C.C. 2612(2), and see Official Comments 4 [what constitutes substantial impairment of value], 5 [cure of nonconformity]; 61 *A.L.R.5th* 611; on partial acceptance of a nonconforming installment, see C.E.B., 1 UCC Sales and Leases, §9.56.) The contract may, of course, enlarge the buyer's right to reject installments by stipulating defects or conditions that would substantially impair the value of the installment. (See Official Comment 4.)

(3) *Nonconformity as Breach of Entire Contract.* A nonconformity or default in one or more installments constitutes a breach of the whole contract if it "substantially impairs the value of the whole contract." (U.C.C. 2612(3); cf. former C.C. 1765(2) [whether whole contract was breached depended upon "materiality" of breach]; 41 *Cal. L. Rev.* 715; on what constitutes substantial impairment under the Code generally, see C.E.B., 1 UCC Sales and Leases, §§9.55, 9.57; 24 *Proof of Facts* 234 [buyer's defenses]; 38 *A.L.R.5th* 191; 4 Anderson 3d (1997 Rev. ed.), §2-608:20 et seq.)

However, the contract may be reinstated if the aggrieved party (a) accepts a nonconforming installment without giving reasonable notification of cancellation, (b) "brings an action with respect only to past installments," or (c) "demands performance as to future installments." (U.C.C. 2612(3), and see Official Comments 6, 7; see also 4 Anderson 3d (1997 Rev. ed.), §2-612:23; C.E.B., 1 UCC Sales and Leases, §9.58.)

West's Key Number Digest, Sales k.163

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Installment Contract*. See 4 Lawrence's Anderson 3d (2006 ed.), §2-612:13 et seq.; C.E.B., Law of Contracts

§8.65.(3) *Nonconformity as Breach of Entire Contract*. See 4 Lawrence's Anderson 3d (2006 ed.), §§2-612:18 et seq., 2-612:40 et seq.



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B. Rejection.

1. Manner and Effect of Rightful Rejection.

4 Witkin Sum. Cal. Law Sales § 161

[§ 161] Manner and Effect of Rightful Rejection.

Rejection of goods must be made within a reasonable time after delivery or tender, and the buyer must seasonably notify the seller. (U.C.C. 2602(1); cf. former C.C. 1768 [similar]; 4 Anderson 3d (1997 Rev. ed.), §2-602:13 et seq.; see generally 67 *Am.Jur.2d* (2003 ed.), *Sales* §587 et seq.; on federal limitations on rejection of perishable commodities, see 7 *U.S.C.*, §499a et seq.; C.E.B., 1 UCC Sales and Leases, §9.70.) Notice should be given promptly, since lack of timely rejection results in acceptance (see *infra*, §165); but the buyer is allowed a reasonable opportunity to inspect the goods. (See U.C.C. 2606(1)(b); U.C.C. 2602, Official Comment 1; *Garetto v. Almaden Vineyards* (1953) 118 *C.A.2d* 99, 101, 257 *P.2d* 477 [wine sold by sample, delivered, tested, and rejected within 2 weeks; held timely].)

After goods have been rejected, any exercise of ownership by the buyer "with respect to any commercial unit is wrongful as against the seller." (U.C.C. 2602(2)(a); see C.E.B., 1 UCC Sales and Leases, §10.49.) If the buyer's rejection is wrongful, it is a breach of the contract and the seller is accorded the remedies generally available to an aggrieved seller. (U.C.C. 2602(3); see 37 *Proof of Facts* 2d 681 [proof that buyer's dissatisfaction with goods was in bad faith or unreasonable]; *infra*, §181 et seq.)

West's Key Number Digest, Sales k.168(4)

SUPPLEMENT: [This section is current through the latest supplement]

See 4 *Lawrence's Anderson* 3d (2006 ed.), §2-602:13 et seq.



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CHAPTER V - Sales

Witkin Summary of California Law
VII. BREACH, REPUDIATION, AND EXCUSE
B. Rejection.
2. Notice of Defects.

4 *Witkin Sum. Cal. Law Sales* § 162

[§ 162] Notice of Defects.

(1) *Requirement of Notice.* A rejecting buyer must state those defects in the goods that are ascertainable by reasonable inspection in the following situations: (a) where the seller might have cured the defect if it was seasonably stated (U.C.C. 2605(1)(a), and see Official Comments 1, 2); and (b) where the parties are *merchants* and the seller has made a written request after rejection "for a full and final written statement of all defects on which the buyer proposes to rely" (U.C.C. 2605(1)(b), and see Official Comment 3).

(2) *Waiver by Failure To Particularize.* The buyer's failure to comply with these requirements "precludes him from relying on the unstated defect to justify rejection or to establish breach." (U.C.C. 2605(1); see *Lockheed Electronics Co. v. Keronix* (1981) 114 C.A.3d 304, 314, 170 C.R. 591; C.E.B., 1 UCC Sales and Leases, §§9.62, 10.38.)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Rejection.
3. Buyer's Duties.

4 Witkin Sum. Cal. Law Sales § 163

[§ 163] Buyer's Duties.

(1) *Reasonable Care of Goods*. A buyer who has physical possession of rejected goods and who has no security interest in them is required "to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them." (U.C.C. 2602(2)(b); see generally 67 *Am.Jur.2d* (2003 ed.), *Sales* §598 et seq.) Otherwise, the buyer has no further obligations with regard to the goods. (U.C.C. 2602(2)(c), and see Official Comment 3; see also 4 Anderson 3d (1997 Rev. ed.), §2-602:60; C.E.B., 1 UCC Sales and Leases, §10.46.)

(2) *Additional Duties of Merchant Buyer*. Where the seller does not have an agent or place of business at the market of rejection, a merchant buyer holding rightfully rejected goods in his or her possession or control must follow any reasonable instructions from the seller regarding the goods. To be "reasonable" the seller's instructions must on demand include indemnity for the buyer's expenses. (U.C.C. 2603(1).) In the absence of instructions, the merchant buyer must make reasonable efforts to sell the goods for the seller's account where they are either "perishable or threaten to decline in value speedily." (U.C.C. 2603(1), and see Official Comment 3; 11 *U.C.L.A. L. Rev.* 83, footnote 605 [comparing federal statutes on disposition of perishable agricultural commodities].) The buyer is entitled to reimbursement for expenses and to a selling commission. (See U.C.C. 2603(2).)

The buyer is held only to good faith in complying with these provisions, and good faith conduct does not constitute an acceptance, conversion, or the basis of an action for damages. (U.C.C. 2603(3), and see Official Comment 4.)

(3) *Buyer With Security Interest in Goods*. To the extent that a buyer has paid for goods rightfully rejected or has reasonably incurred expenses in their inspection, receipt, transportation, care, and custody, the buyer has a security interest in them. (U.C.C. 2711(3).) Accordingly, the buyer, acting as an aggrieved seller (see U.C.C. 2706), may hold and resell them. (U.C.C. 2711(3).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Reasonable Care of Goods*. See 4 Lawrence's Anderson 3d (2006 ed.), §2-602:61 et seq.



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B. Rejection.
4. Buyer's Option To Salvage.

4 Witkin Sum. Cal. Law Sales § 164

[§ 164] Buyer's Option To Salvage.

The Commercial Code changes prior law by permitting a buyer to provide for or dispose of rejected goods without being found to have accepted or converted them. (See U.C.C. 2604, and West's California Code Comment; see also C.E.B., 1 UCC Sales and Leases, §§10.46, 10.48.) The provision is intended to "reduc[e] the stake in dispute" and "accord all reasonable leeway to a rightfully rejecting buyer acting in good faith." (U.C.C. 2604, Official Comment.)

Under U.C.C. 2604, a buyer who has not received instructions within a reasonable time after rejection may store the rejected goods in the seller's name, reship them to the seller, resell them for the seller's account, or take any other action in good faith to realize on or preserve the goods. (See Official Comment.) These options are accorded to *merchants* as well as other buyers, but they do not modify a merchant's *duties* with respect to perishable goods. (U.C.C. 2604; see *supra*, §163.)

A buyer who resells must account to the seller for proceeds in excess of the buyer's security interest. (U.C.C. 2706(6).) The buyer is entitled to reimbursement for the expenses of resale and for the selling commission provided for in U.C.C. 2603(2). (U.C.C. 2604.)

West's Key Number Digest, Sales k.168(4)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Acceptance.
1. What Constitutes Acceptance.

4 Witkin Sum. Cal. Law Sales § 165

[§ 165] What Constitutes Acceptance.

A buyer is deemed to have accepted goods when, after a reasonable opportunity to inspect them, the buyer either (1) fails to make an effective rejection (U.C.C. 2606(1)(b); see *supra*, §161), or (2) "signifies" to the seller either that the goods are conforming "or that he will take or retain them in spite of their nonconformity" (U.C.C. 2606(1)(a)). (See Official Comment 3 [conditional communication]; 4 Anderson 3d (1997 Rev. ed.), §2-606:34 et seq. [communications and conduct signifying acceptance]; C.E.B., 1 UCC Sales and Leases, §10.21; 67 *Am.Jur.2d* (2003 ed.), *Sales* §570 et seq.; 37 *Proof of Facts* 2d 593.) (On acceptance of part of a commercial unit, see U.C.C. 2606(2); for pre-Code cases on effect of passage of time after delivery on buyer's right to reject, see *Gladium Co. v. Thatcher* (1928) 95 C.A. 85, 91, 272 P. 340; *Pacific Commercial Co. v. Greer* (1933) 129 C.A. 751, 757, 19 P.2d 543; *Garetto v. Almaden Vineyards* (1953) 118 C.A.2d 99, 102, 257 P.2d 477.)

Acceptance also occurs when a buyer performs "any act inconsistent with the seller's ownership." (U.C.C. 2606(1)(c).) But if that act is wrongful as against the seller, as where the buyer exercises ownership of the goods after rejection (see *supra*, §161), it is an acceptance only if ratified by the seller. (U.C.C. 2606(1)(c), and see Official Comment 4; see also C.E.B., 1 UCC Sales and Leases, §10.24; 67 *A.L.R.3d* 363 [use of goods by buyer]; 37 *Proof of Facts* 2d 593.)

West's Key Number Digest, Sales k.178(1) et seq.

SUPPLEMENT: [This section is current through the latest supplement]
See 4 Lawrence's Anderson 3d (2006 ed.), §2-606:34 et seq.; C.E.B., *Law of Contracts* §8.59.



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C. Acceptance.
2. Effect of Acceptance.

4 Witkin Sum. Cal. Law Sales § 166

[§ 166] Effect of Acceptance.

(1) *Right To Reject Precluded*. "Acceptance of goods by the buyer precludes rejection." After acceptance the buyer may avoid the sale only by an effective *revocation*, and acceptance with knowledge of nonconformities impairs the buyer's ability to revoke acceptance for those nonconformities. (U.C.C. 2607(2), and see Official Comment 2; see generally C.E.B., 1 UCC Sales and Leases, §10.30; 67 *Am.Jur.2d* (2003 ed.), *Sales* §601 et seq.; on revocation, see *infra*, §167 et seq.)

(2) *Other Remedies Unimpaired*. "Acceptance does not of itself impair any other remedy provided" by the Code for nonconformity. (U.C.C. 2607(2); see C.E.B., 1 UCC Sales and Leases, §10.31.) Thus, acceptance of nonconforming goods does not preclude an action for breach although the "burden is on the buyer to establish any breach with respect to the goods accepted." (U.C.C. 2607(4).) Also, the acceptance of a nonconforming installment does not affect the buyer's rights in connection with future installments. (See U.C.C. 2607, and see Official Comment 3; 32 *A.L.R.2d* 1117 [effect of acceptance of delayed or defective installment].)

(3) *Right to Payment*. "[O]nce the buyer accepts a tender the seller acquires a right to its price on the contract terms." (U.C.C. 2607(1), Official Comment 1; cf. West's California Code Comment [obligation to pay following passage of title under former law].) A buyer who accepts the whole tender must pay the contract price; a buyer who makes a partial acceptance (see *supra*, §159) must pay for the goods accepted at the contract rate. (U.C.C. 2607(1); see C.E.B., 1 UCC Sales and Leases, §10.29.)

West's Key Number Digest, Sales k.179(1) et seq.

SUPPLEMENT: [This section is current through the latest supplement]



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D. Revocation of Acceptance.
1. In General.

4 *Witkin Sum. Cal. Law Sales* § 167

[§ 167] In General.

Although a buyer who has accepted goods may not subsequently reject them, he or she may revoke acceptance and thereby assume the same legal status as a rejecting buyer. (See generally 67A *Am.Jur.2d* (2003 ed.), *Sales* §1054 et seq.) Generally, the restrictions on the buyer's right to revoke acceptance are greater than on the right to reject before acceptance. (See U.C.C. 2608, and Official Comment 2; *infra*, §168.)

Under the Sales Act, the buyer could *rescind* a sales contract after a breach by the seller and avoid liability for the purchase price by offering to return the goods in substantially their original condition. (Former C.C. 1789; see 47 *A.L.R.5th* 677, 756 [rescission of used motor vehicle sale for breach of implied warranty].) But rescission under the Sales Act required an election that prevented the buyer from receiving damages, while justifiable revocation under the Code puts the buyer in the position of a buyer rejecting goods (see *supra*, §161), and allows the buyer remedies accordingly. (See U.C.C. 2711(1); U.C.C. 2608, Official Comment 1; U.C.C. 2608, West's California Code Comment; C.E.B., 1 UCC Sales and Leases, §10.32 et seq.)

West's Key Number Digest, Sales k.113 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



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D. Revocation of Acceptance.
2. Justifiable Revocation.

4 Witkin Sum. Cal. Law Sales § 168

[§ 168] Justifiable Revocation.

The buyer may revoke acceptance, either as to an entire lot or as to one or more commercial units, where the nonconformity "substantially impairs" the value of the goods in question. (U.C.C. 2608(1), and see Official Comments 2, 7; 37 Proof of Facts 2d 681 [proof that buyer's dissatisfaction with goods was in bad faith or unreasonable]; on what constitutes substantial impairment, see 4 Anderson 3d (1997 Rev. ed.), §2-608:128 et seq.; 38 A.L.R.5th 191; on measure and elements of buyer's recovery upon revocation of acceptance, see 65 A.L.R.3d 388.) Additionally, acceptance must have been made either (1) on the reasonable assumption that the nonconformity would be cured, or (2) without discovery of the nonconformity where acceptance was reasonably induced by the difficulty of discovery or by the seller's assurances. (U.C.C. 2608(1)(a), (1)(b); see C.E.B., 2 UCC Sales and Leases, §17.61.) The seller's assurances may be found in the contract, in explicit language used at the time of delivery, or in the circumstances. (Official Comment 3.) These assurances may also affect the requirements as to the time in which revocation must be made. (See *infra*, §169; see also *Ibrahim v. Ford Motor Co. (1989) 214 C.A.3d 878, 897, 898, 263 C.R. 64, infra*, §318 [reasonable continued use of motor vehicle does not prevent buyer from asserting revocation of acceptance; seller is protected by recoupment right of setoff].)

A buyer who has justifiably revoked acceptance of goods has the same rights and duties with respect to those goods as a rejecting buyer. (U.C.C. 2608(3); see *supra*, §161 et seq.)

A buyer waives the right to recover payment against documents for defects that were apparent on the face of the documents, unless payment was made with reservation of rights (see U.C.C. 1207). (U.C.C. 2605(2).) The documents are accepted by payment against them, and the statute prevents revocation of this particular acceptance. (See U.C.C. 2605, Official Comment 4; C.E.B., 1 UCC Sales and Leases, §10.41.)

SUPPLEMENT: [This section is current through the latest supplement]

See 4 Lawrence's Anderson 3d (2006 ed.), §2-608:129 et seq. U.C.C. 1207, on payment with a reservation of rights, was renumbered U.C.C. 1308 in 2006 without substantive change.

U.C.C. 2605(2), on waiver of the right to recover, was amended in 2006 to change "on the face of the documents" to "in the documents."



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D. Revocation of Acceptance.
3. Time and Notice of Revocation.

4 Witkin Sum. Cal. Law Sales § 169

[§ 169] Time and Notice of Revocation.

(1) *Pre-Code: Notice of Rescission.* The pre-Code right to rescind the sales contract (see supra, §167) was subject to a requirement of timeliness, and the right was said to be waived after goods had been held for an unreasonable time without notice of rescission. (See *Hogan v. Anthony* (1921) 52 C.A. 158, 165, 198 P. 47; cf. *Mayer v. Northwood Textile Mills* (1951) 105 C.A.2d 406, 409, 233 P.2d 657 [rescission held timely]; *Garetto v. Almaden Vineyards* (1953) 118 C.A.2d 99, 101, 257 P.2d 477 [drawing analogy between cases involving reasonable time for acceptance and those involving reasonable time for rescission]; 1 *Summary* (10th), *Contracts*, §939.) But no waiver resulted where time elapsed while an attempt was being made to correct the defects or after the seller had made assurances that they could and would be corrected. (*J.B. Colt Co. v. Freitas* (1926) 76 C.A. 278, 286, 244 P. 916; see *Noll v. Baida* (1927) 202 C. 98, 107, 259 P. 433 [buyer of rug, after being assured by seller that rug was as represented, was entitled to make further investigations before rescinding]; 1 *So. Cal. L. Rev.* 290.)

(2) *Commercial Code: Notice of Revocation.* The Code requires revocation to be made "within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects." (U.C.C. 2608(2); see 4 Anderson 3d (1997 Rev. ed.), §2-608:235 et seq.; C.E.B., 1 UCC Sales and Leases, §10.33; 65 *A.L.R.3d* 354 [what constitutes reasonable time]; 24 *Proof of Facts* 201, 255 [establishing facts necessary to justify revocation of acceptance after passage of time].) The requirement of reasonable time is normally intended to extend beyond other time periods relevant to sales because revocation "will generally be resorted to only after attempts at adjustment have failed." (Official Comment 4.)

A revocation is not effective until the buyer notifies the seller of it. (U.C.C. 2608(2), and see Official Comment 5; see generally 4 Anderson 3d (1997 Rev. ed.), §2-608:188 et seq.; C.E.B., 2 UCC Sales and Leases, §§17.62, 17.63; 6 *Proof of Facts* 2d 215 [buyer's timely notice of breach in regard to accepted goods].)

West's Key Number Digest, Sales k.126(1)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Commercial Code: Notice of Revocation.* See 4 Lawrence's Anderson 3d (2006 ed.), §§2-608:187 et seq., 2-608:189.



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E. Repudiation of Contract.
1. Right to Assurance of Performance.

4 Witkin Sum. Cal. Law Sales § 170

[§ 170] Right to Assurance of Performance.

The doctrine of anticipatory breach gives some protection to a contracting party when the other party, by repudiation or other acts, manifests an intention not to perform. (See *infra*, §171.) U.C.C. 2609 greatly extends this doctrine by giving a party who reasonably feels insecure a remedy to obtain definite assurance of counterperformance, even though the other party has not yet been guilty of acts amounting to an anticipatory breach. The underlying theory is that "A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired." (U.C.C. 2609(1); see *48 So. Cal. L. Rev. 1358* [examining doctrine, and urging its extension to other transactions as well as sale of goods]; C.E.B., 2 UCC Sales and Leases, §16.2 et seq.; *67 Am.Jur.2d (2003 ed.)*, Sales §480 et seq.)

Official Comment 1 explains the purpose of the statute: "The section rests on the recognition of the fact that the essential purpose of a contract between commercial men is actual performance and they do not bargain merely for a promise, or for a promise plus the right to win a lawsuit and that a continuing sense of reliance and security that the promised performance will be forthcoming when due, is an important feature of the bargain. If either the willingness or the ability of a party to perform declines materially between the time of contracting and the time for performance, the other party is threatened with the loss of a substantial part of what he has bargained for. A seller needs protection not merely against having to deliver on credit to a shaky buyer, but also against having to procure and manufacture the goods, perhaps turning down other customers. Once he has been given reason to believe that the buyer's performance has become uncertain, it is an undue hardship to force him to continue his own performance. Similarly, a buyer who believes that the seller's deliveries have become uncertain cannot safely wait for the due date of performance when he has been buying to assure himself of materials for his current manufacturing or to replenish his stock of merchandise."

The implementation of the theory is as follows:

(1) *Condition*. The remedy may be invoked "[w]hen reasonable grounds for insecurity arise with respect to the performance of either party." And, between merchants, this is determined "according to commercial standards." (U.C.C. 2609(1), (2), and see Official Comment 3; see also U.C.C. 2311, Official Comment 3 [failure to cooperate in specifying particulars of performance as grounds for insecurity]; *37 A.L.R.5th 459* [what constitutes "reasonable grounds for insecurity"].)

(2) *Remedy: Suspension and Demand.* The aggrieved party (a) may make written demand for "adequate assurance of due performance," and (b) until such assurance is received, "may if commercially reasonable suspend any performance for which he has not already received the agreed return." (U.C.C. 2609(1).) Between merchants, adequacy of assurance is determined according to commercial standards. (U.C.C. 2609(2), and see Official Comment 4.) And acceptance of an improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance. (U.C.C. 2609(3).)

(3) *Failure To Comply.* "After receipt of a justified demand failure to provide within a reasonable time not exceeding 30 days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract." (U.C.C. 2609(4), and see Official Comment 5.)

SUPPLEMENT: [This section is current through the latest supplement]
See C.E.B., Law of Contracts §8.58.



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E. Repudiation of Contract.

2. Anticipatory Repudiation.

a. Nature and Effect.

4 Witkin Sum. Cal. Law Sales § 171

[§ 171] Nature and Effect.

(1) *What Constitutes Anticipatory Repudiation.* The doctrine of anticipatory repudiation (commonly called an "anticipatory breach") is a well established principle of contract law that is codified as to sales contracts by U.C.C. 2610 and 2611. (See U.C.C. 2610, West's California Code Comment; 11 *U.C.L.A. L. Rev.* 94; 1 *A.L.R.4th* 527; 67A *Am.Jur.2d* (2003 ed.), *Sales* §801 et seq.; 3 *Proof of Facts* 2d 429; 1 *Summary* (10th), *Contracts*, §861 et seq.)

"[A]nticipatory repudiation centers upon an overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance." (U.C.C. 2610, Official Comment 1.) Any action reasonably indicating that an obligation will not be met is sufficient; e.g., a party's demand for performance in excess of contract requirements, or a failure to give assurance rightfully demanded. (See U.C.C. 2610, Official Comment 2; 4 *Anderson* 3d (1997 Rev. ed.), §2-610:5; C.E.B., 2 *UCC Sales and Leases*, §16.21 et seq.; 1 *Summary* (10th), *Contracts*, §863 et seq.)

Repudiation must be "with respect to a performance not yet due the loss of which will substantially impair the value of the contract." (U.C.C. 2610, and see Official Comment 3; 4 *Anderson* 3d (1997 Rev. ed.), §2-610:6 et seq.; C.E.B., 2 *UCC Sales and Leases*, §16.26.)

(2) *Effect of Repudiation.* The aggrieved party may merely await performance, but only for a commercially reasonable time, and may not permit damages to accumulate beyond such time. (U.C.C. 2610(a), and see Official Comment 1; 12 *Proof of Facts* 2d 179 [commercial reasonableness of aggrieved party's acts following anticipatory repudiation of sales contract].) Alternatively, the aggrieved party may resort to any remedy for breach, and may elect to do this even after notifying the repudiating party that he or she would await performance and has urged a retraction. (U.C.C. 2610(b); see C.E.B., 2 *UCC Sales and Leases*, §16.27 et seq.)

Whether waiting or declaring a breach, the aggrieved party may suspend his or her own performance, or, if the aggrieved party is the seller, resort to the loss-minimizing procedures accorded an aggrieved seller by U.C.C. 2704 (see *infra*, §184). (U.C.C. 2610(c), and see Official Comment 4; C.E.B., 2 *UCC Sales and Leases*, §16.30 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *What Constitutes Anticipatory Repudiation.* See 4 Lawrence's Anderson 3d (2006 ed.), §§2-610:8, 2-610:10 et seq.; C.E.B., Law of Contracts §8.75.



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- E. Repudiation of Contract.
- 2. Anticipatory Repudiation.
- b. Retraction of Repudiation.

4 Witkin Sum. Cal. Law Sales § 172

[§ 172] Retraction of Repudiation.

If the aggrieved party does not cancel the contract, materially change position, or otherwise indicate that he or she considers the repudiation final, the repudiating party may retract the repudiation. But the retraction must occur before the repudiating party's next performance is due. (U.C.C. 2611(1), and see Official Comment 1; C.E.B., 2 UCC Sales and Leases, §§16.35, 16.36.) The repudiating party's rights under the contract are reinstated by retraction, subject to due excuse and allowance for any delay of the aggrieved party occasioned by the repudiation. (U.C.C. 2611(3); see 4 Anderson 3d (1997 Rev. ed.), §2-611:3 et seq.)

A sufficient retraction may be made by any method that clearly indicates the repudiating party's intention to perform, but it "must include any assurance justifiably demanded." (U.C.C. 2611(2), and see Official Comment 2.)

SUPPLEMENT: [This section is current through the latest supplement]

See 4 Lawrence's Anderson 3d (2006 ed.), §§2-610:68, 2-611:3 et seq.; C.E.B., Law of Contracts §8.76.



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F. Excusable Nonperformance.
1. Casualty to Identified Goods.

4 Witkin Sum. Cal. Law Sales § 173

[§ 173] Casualty to Identified Goods.

The contract for sale may be avoided or an allowance in terms made where there has been a casualty to goods that were *identified* to the contract when made and that are *required for its performance*. (U.C.C. 2613; see C.E.B., 2 UCC Sales and Leases, §16.51 et seq.; 51 *A.L.R.4th* 537; 67 *Am.Jur.2d* (2003 ed.), *Sales* §§540, 541.) The casualty must occur before the risk of loss passes to the buyer, and it may occur prior to the making of the contract if the identified goods are destroyed without the knowledge of either party. (See U.C.C. 2613, and Official Comment 2.) The casualty must not be due to the fault, either negligence or wilful wrong, of either party. (U.C.C. 2613, and Official Comment 1; see C.E.B., 2 UCC Sales and Leases, §16.54.)

"If the loss is total the contract is avoided." (U.C.C. 2613(a).) If the goods are only partially lost or the casualty causes deterioration to the point of nonconformity, the buyer may "demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price," *but without any further rights against the seller*. (U.C.C. 2613(b); see 4 Anderson 3d (1997 Rev. ed.), §2-613:11 et seq. [applicability of good faith requirement of U.C.C. 1203]; C.E.B., 2 UCC Sales and Leases, §16.56; cf. former C.C. 1727, 1728 [unless contract was "divisible," buyer had more limited options of avoiding contract or taking remaining goods at full contract price].)

Where the goods were shipped under a "no arrival, no sale" term (see *supra*, §120), the buyer may treat the goods as having suffered a casualty if, without the seller's fault, they are in part lost, have deteriorated to the point of nonconformity, or arrive after the contract time. (U.C.C. 2324(b); see U.C.C. 2613, Official Comment 3.)

SUPPLEMENT: [This section is current through the latest supplement]

U.C.C. 1203, setting forth the requirement of good faith, was renumbered U.C.C. 1304 in 2006.

See 4 Lawrence's Anderson 3d (2006 ed.), §2-613:13 et seq.; C.E.B., Law of Contracts §8.64.



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F. Excusable Nonperformance.
2. Inability To Deliver or Pay as Agreed.

4 Witkin Sum. Cal. Law Sales § 174

[§ 174] Inability To Deliver or Pay as Agreed.

(1) *Unavailability of Agreed Delivery Facilities.* Where without fault of either party the agreed manner of delivery becomes commercially impracticable, a "commercially reasonable substitute," if available, must be tendered and accepted. (U.C.C. 2614(1); see 4 Anderson 3d (1997 Rev. ed.), §§2-614:14, 2-614:15; C.E.B., 1 UCC Sales and Leases, §9.69; on limitation where financing company has issued letter of credit, see Official Comment 2; on extension of substitution to shipping documents, see C.E.B., 1 UCC Sales and Leases, §9.77.)

(2) *Interference With Agreed Method of Payment.* If the means or manner of payment agreed upon fails due to governmental regulations, foreign or domestic: (a) *delivery may be withheld or stopped* by the seller, unless the buyer provides a substitute payment that is "commercially a substantial equivalent"; or (b) *if delivery has been made*, the buyer's obligation may be discharged by making payment in conformance with the regulation, unless that regulation is "discriminatory, oppressive or predatory." (U.C.C. 2614(2), and see Official Comment 3; C.E.B., 1 UCC Sales and Leases, §10.66.)

West's Key Number Digest, Sales k.195

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Unavailability of Agreed Delivery Facilities.* See 4 Lawrence's Anderson 3d (2006 ed.), §§2-614:10, 2-614:11; C.E.B., Law of Contracts §8.75.



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F. Excusable Nonperformance.
3. Excusable Delay or Nondelivery: Impracticability.
a. In General.

4 *Witkin Sum. Cal. Law Sales* § 175

[§ 175] In General.

(1) *Excuse of Impracticability.* Impossibility is a recognized excuse for nonperformance of contractual obligations, and modern cases have extended the doctrine to include impracticability due to excessive and unreasonable difficulty or expense. (See 1 *Summary* (10th), *Contracts*, §828.) The Code excuses a seller's nonperformance where the agreed performance has been made impracticable by (a) "the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made"; or (b) "compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid." (U.C.C. 2615(a); see *Terry v. Atlantic Richfield Co.* (1977) 72 C.A.3d 962, 964, 140 C.R. 510, *infra*, §176 [U.C.C. 2615 codifies doctrine of commercial frustration excusing full performance of supply contracts]; C.E.B., 2 UCC Sales and Leases, §16.61 *et seq.*; 55 A.L.R.5th 1; 67 *Am.Jur.2d* (2003 ed.), *Sales* §548 *et seq.*; for comparison with prior law, see U.C.C. 2615, West's California Code Comment; 11 *U.C.L.A. L. Rev.* 101.)

(2) *Justifying Contingencies.* U.C.C. 2615 does not enumerate contingencies and "is to be interpreted in all cases sought to be brought within its scope in terms of its underlying reason and purpose." (Official Comment 2; for the drafters' comments as to the effect of particular contingencies, see Official Comments 4 [increased cost], 5 [failure of source of supply], 7 [inconvenience], 9 [crop failure]; on unanticipated inflationary price rise as contingency under U.C.C. 2615, see 50 *So. Cal. L. Rev.* 1.)

The statute does not apply where the impracticability results from a casualty to identified goods or from interference with the agreed delivery facilities or method of payment. (U.C.C. 2615, Official Comment 1; see *supra*, §§173, 174.) Thus, a strike that obstructs the agreed mode of delivery does not create an excuse for nonperformance but merely requires that alternative delivery be tendered and accepted under U.C.C. 2614. If, however, the alternative delivery created new and unforeseen problems for the seller, U.C.C. 2615 might be applicable. (See C.E.B., 1 UCC Sales and Leases, §9.69; 14 *U.C. Davis L. Rev.* 669 [impossibility and impracticability due to strike]; 55 A.L.R.5th 1, 98 [labor dispute as excuse under U.C.C. 2615].)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Excuse of Impracticability*. See C.E.B., Law of Contracts §8.62.



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b. Partial Capacity To Perform.

4 *Witkin Sum. Cal. Law Sales* § 176

[§ 176] Partial Capacity To Perform.

A seller whose capacity to perform is only partially affected must allocate the available goods among his or her customers in a fair and reasonable manner. In determining the allocations, the seller may include regular customers not then under contract and the seller's own requirements. (U.C.C. 2615(b), and see Official Comment 11.)

The seller must seasonably notify the buyer of any delay or nondelivery, and, if available goods are to be allocated, of the buyer's estimated quota. (U.C.C. 2615(c).)

In *Terry v. Atlantic Richfield Co.* (1977) 72 C.A.3d 962, 140 C.R. 510, defendant ARCO had agreed to supply all the gasoline requirements of plaintiff service station operators. In May 1973, during the nationwide gasoline shortage, ARCO, pursuant to requests from the federal Government, allocated supplies among its dealers. Plaintiffs, dissatisfied with their allocation, sought damages for breach of contract. *Held*, summary judgment for defendant affirmed.

(a) The issue, whether ARCO's allocation was conducted in the fair and reasonable manner required by U.C.C. 2615(b), was one of fact; but the undisputed facts established both fairness and reasonableness. (72 C.A.3d 967.)

(b) Plaintiffs, conceding the general fairness of the allocation program, argued that it was unfair to them because of the unique circumstances of their operation. But the statute calls for collective treatment of the supplier's customers as a group, not an individualized approach geared solely to the needs of particular customers. (72 C.A.3d 968.)

SUPPLEMENT: [This section is current through the latest supplement]



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c. Agreed Modification.

4 *Witkin Sum. Cal. Law Sales* § 177

[§ 177] Agreed Modification.

(1) *Buyer's Options*. The buyer may, by written notice, either accept a modification necessitated by impracticability or reject it and terminate the contract. (U.C.C. 2616(1).) If, after the seller's notification, "the buyer fails so to modify the contract within a reasonable time not exceeding 30 days the contract lapses with respect to any deliveries affected." (U.C.C. 2616(2), and see Official Comment 2.) Where the modification is of an installment contract and "the prospective deficiency substantially impairs the value of the whole contract," the buyer may reject the modification and terminate the whole contract. (U.C.C. 2616(1); see *supra*, §160.)

(2) *Seller's Undertaking of Greater Liability*. A seller may agree to assume greater liability than the statute requires, and such an undertaking may be found "in the circumstances surrounding the contracting, in trade usage and the like." (U.C.C. 2615, Official Comment 8; on provisions enlarging the seller's recourse to impracticability, see 4 Anderson 3d (1997 Rev. ed.), §2-615:11 et seq.) But the buyer's options under U.C.C. 2616 to accept a modification or terminate the contract "may not be negated by agreement except insofar as the seller has assumed a greater obligation" under U.C.C. 2615. (U.C.C. 2616(3).)

West's Key Number Digest, Sales k.172

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Buyer's Options*. See C.E.B., *Law of Contracts* §8.63.(2) *Seller's Undertaking of Greater Liability*. See 4 Lawrence's Anderson 3d (2006 ed.), §2-615:11.



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1. Remedies for Fraud or Breach of Collateral Contracts.

4 Witkin Sum. Cal. Law Sales § 178

[§ 178] Remedies for Fraud or Breach of Collateral Contracts.

The remedies of a party for material misrepresentation or fraud "include all remedies available under this division for nonfraudulent breach." (U.C.C. 2721, and see Official Comment; West's California Code Comment; 4B Anderson 3d (2001 Rev. ed.), §2-721:3 et seq.; Cal. Civil Practice, 4 Business Litigation, §40.37; 37 A.L.R.4th 110 [misrepresentation in computer sales].) This is contrary to the limited "out of pocket" loss rule of damages in other fraud actions (see 6 *Summary* (10th), *Torts*, §1710).

"Remedies for breach of any obligation or promise collateral or ancillary to a contract for sale are not impaired" by the sales provisions of the Code. (U.C.C. 2701; see C.E.B., 2 UCC Sales and Leases, §17.3; 30 A.L.R.3d 1395 [liability of defaulting purchaser to owner's broker or auctioneer].)

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2. Actions Against Third Parties.

4 Witkin Sum. Cal. Law Sales § 179

[§ 179] Actions Against Third Parties.

U.C.C. 2722 broadens the definition of "real party in interest" for the purposes of an action against a third party who "so deals with goods which have been identified to a contract for sale as to cause actionable injury to a party to that contract." (See U.C.C. 2722, and Official Comment; C.E.B., 2 UCC Sales and Leases, §18.74.)

Either buyer or seller may "with the consent of the other sue for the benefit of whom it may concern." (U.C.C. 2722(c).) Absent agreement, suit may be brought by the party who has *title* to, or a *security interest*, a *special property* or an *insurable interest* in the goods. If the goods have been destroyed or converted "a right of action is also in the party who either bore the risk of loss under the contract for sale or has since the injury assumed that risk as against the other." (U.C.C. 2722(a); see 4B Anderson 3d (2001 Rev. ed.), §§2-722:7, 2-722:8.) If the party plaintiff did not bear the risk of loss at the time of the injury, and he and the other party to the contract have not provided for the disposition of any recovery, "his suit or settlement is, subject to his own interest, as a fiduciary for the other party to the contract." (U.C.C. 2722(b).)

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3. Effect of Cancellation or Rescission.

4 Witkin Sum. Cal. Law Sales § 180

[§ 180] Effect of Cancellation or Rescission.

The Commercial Code generally favors cumulation, rather than election, of remedies that are not otherwise incompatible. (See U.C.C. 2703, Official Comment 1.) Accordingly, "[n]either rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy." (U.C.C. 2721, and see Official Comment.) And a party who uses such expressions as "cancellation" or "rescission" will not be considered to have renounced or discharged any claim for damages for an antecedent breach, unless he or she has indicated a clear intent to do so by, for example, cancelling "without reservation of rights." (U.C.C. 2720, and Official Comment; see *67A Am.Jur.2d (2003 ed.)*, Sales §§798, 799.)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Remedies of Seller.

1. In General.

a. Outline of Seller's Remedies.

4 Witkin Sum. Cal. Law Sales § 181

[§ 181] Outline of Seller's Remedies.

U.C.C. 2703 is an index to the remedies accorded an aggrieved seller under the Commercial Code. Subject to the particular requirements and restrictions of each remedy, the seller may:

- (1) Withhold delivery of the goods involved. (U.C.C. 2703(a).)
- (2) Stop delivery by any bailee. (Infra, §185.)
- (3) Identify goods to the contract. (Infra, §184.)
- (4) Resell the goods. (Infra, §187.)
- (5) Recover damages or the price for nonacceptance. (Infra, §188 et seq.)
- (6) Cancel. (U.C.C. 2703(f).)

The pre-Code doctrine of election of remedies was eliminated. (See U.C.C. 2703, West's California Code Comment.) The remedies provided by the Code "are essentially cumulative in nature and include all of the available remedies for breach. Whether the pursuit of one remedy bars another depends entirely on the facts of the individual case." (U.C.C. 2703, Official Comment 1; on sellers' remedies under the Code generally, see C.E.B., 2 UCC Sales and Leases, §17.7 et seq.; Cal. Civil Practice, 4 Business Litigation, §40:96 et seq.; Cal. Transactions Forms, 4 Business Transactions §24:387 et seq.; 3 Williston on Sales (5th), §24-1 et seq.; 67A *Am.Jur.2d* (2003 ed.), Sales §894 et seq.; on remedies for fraud and breach of collateral promises, see supra, §178; on the former remedies of a conditional seller as a creditor in a secured transaction, see 4 *Summary* (10th), *Secured Transactions in Personal Property*, §17.)

Under U.C.C. 2703, a seller is aggrieved and entitled to these remedies when the buyer (1) repudiates (supra, §170), (2) wrongfully rejects the goods (supra, §161), (3) unjustifiably revokes acceptance (supra, §168), or (4) fails to make a payment due on or before delivery (supra, §43). Special remedies are provided where the buyer becomes insolvent. (See infra, §182.)

Where the default is as to one or more installments of an installment contract and "substantially impairs the value of the whole contract," the breach is of the whole contract. (U.C.C. 2612(3); on reinstatement of installment contract after breach, see *supra*, §160.)

The sellers' remedies are generally available to persons "in the position of a seller." (See U.C.C. 2707(2).) This term includes "as against a principal an agent who has paid or become responsible for the price of goods on behalf of his principal or anyone who otherwise holds a security interest or other right in goods similar to that of a seller." (U.C.C. 2707(1); see 4A Anderson 3d (1997 Rev. ed.), §2-707:4 et seq.)

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SUPPLEMENT: [This section is current through the latest supplement]

See 4A Lawrence's Anderson 3d (2006 ed.), §2-707:4 et seq.; C.E.B., Law of Contracts §§12.3 et seq., 12.52 et seq.



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1. In General.

b. Buyer's Insolvency.

4 *Witkin Sum. Cal. Law Sales* § 182

[§ 182] Buyer's Insolvency.

A seller who discovers that the buyer is insolvent may refuse delivery except for cash, "including payment for all goods theretofore delivered under the contract." (U.C.C. 2702(1); see C.E.B., 2 UCC Sales and Leases, §17.10.) The seller may also stop delivery of any goods that have been shipped (see *infra*, §185), or reclaim goods that have been accepted by the insolvent buyer (see *infra*, §186). A seller who successfully reclaims goods from an insolvent buyer is excluded from any other remedies with respect to those goods. (U.C.C. 2702(3).)

"A person is 'insolvent' who either has ceased to pay his or her debts in the ordinary course of business, cannot pay his or her debts as they become due, or is insolvent within the meaning of the federal bankruptcy law." (U.C.C. 1201(23); see C.E.B., 2 UCC Sales and Leases, §17.28 [form of notice denying insolvency].) Presumably, the remedies for insolvency are not available to one who *knowingly* contracts with an insolvent buyer. (See 4A Anderson 3d (1997 Rev. ed.), §2-705:19.)

SUPPLEMENT: [This section is current through the latest supplement]

See 4A Lawrence's Anderson 3d (2006 ed.), §2-705:7. U.C.C. 1201(23) was amended in 2006 to define "insolvent" as "having generally ceased to pay debts in the ordinary course of business other than as a result of bona fide dispute," "being unable to pay debts as they become due," or "being insolvent within the meaning of federal bankruptcy law."



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1. In General.

c. Forfeiture of Deposit.

4 *Witkin Sum. Cal. Law Sales* § 183

[§ 183] Forfeiture of Deposit.

(1) *Pre-Code*. Formerly, there was some confusion as to the disposition of deposits and prepayments after a breach by the buyer. California law generally prohibits forfeiture and penalties. (See 1 *Summary* (10th), *Contracts*, §503; 13 *Summary* (10th), *Equity*, §20.) But forfeiture was permitted where goods were purchased with a downpayment and the buyer subsequently refused to accept delivery. (See *Tomboy Gold & Copper Co. v. Marks* (1921) 185 C. 336, 339, 197 P. 94; *Arkelian v. National Bank of Visalia* (1930) 103 C.A. 764, 767, 284 P. 933.)

It was also intimated in some California cases that, upon default by the buyer, the seller might retake the goods without rescission and therefore without restoration of previously paid installments on the purchase price. This was substantially the drastic remedy of the *conditional seller*, and the cases relied on were concerned with conditional sales. (See *Rayfield v. Van Meter* (1898) 120 C. 416, 420, 52 P. 666; *Liver v. Mills* (1909) 155 C. 459, 463, 101 P. 299.) It seems clear that the seller under an ordinary contract of sale had no right of repossession and forfeiture in the absence of special provision in the contract. And a provision in the contract permitting the seller, upon default by the buyer, to keep the goods and also recover the entire contract price, was held to be an unenforceable penalty, the damages being readily ascertainable. (*Mente & Co. v. Fresno Compress & Warehouse Co.* (1931) 113 C.A. 325, 329, 298 P. 126; see also *Aimo v. Mitchell* (1932) 124 C.A. 497, 505, 12 P.2d 1059.)

(2) *Commercial Code*. The Code permits a limited forfeiture of a buyer's deposit or prepayment. After a seller has justifiably withheld delivery because of a buyer's breach, the buyer is entitled to restitution of amounts paid in excess of 20% of the total value of the buyer's performance under the contract or \$ 500, whichever is smaller. (U.C.C. 2718(2)(b); see C.E.B., 2 UCC Sales and Leases, §17.23.) The 20% forfeiture may be modified by a term of the sales contract for liquidated damages, provided that such term conforms to the restrictions of U.C.C. 2718(1) (see *infra*, §212). (U.C.C. 2718(2)(a); see C.E.B., 2 UCC Sales and Leases, §18.49.)

The forfeiture provisions of U.C.C. 2718 apply whether the prepayment is to be applied on the price or is merely intended as security for performance (Official Comment 2) and whether the buyer pays in money or goods (see U.C.C. 2718(4)).

West's Key Number Digest, Sales k.391(9)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Identification of Goods to Contract.

4 Witkin Sum. Cal. Law Sales § 184

[§ 184] Identification of Goods to Contract.

(1) *Identification*. On learning of a breach, the seller may identify to the contract any conforming goods not yet identified but already in his or her possession or control. (U.C.C. 2704(1)(a).) Although unfinished goods may not be identifiable to the contract (see *supra*, §140), an aggrieved seller may treat such goods as the subject of resale if they "have demonstrably been intended for the particular contract." (U.C.C. 2704(1)(b).)

Identification of goods after breach permits the seller to determine damages by resale. (See *infra*, §187.) It may also perfect the buyer's right to specific recovery. (See *infra*, §209.) (See generally C.E.B., 2 UCC Sales and Leases, §17.32 et seq.; 4A Anderson 3d (1997 Rev. ed.), §2-704:7.)

(2) *Completion of Manufacture*. Under the Sales Act, where no labor or material had yet been expended in order to fulfill the seller's obligation, and the buyer repudiated or notified the seller not to proceed further, the seller could not continue to perform if the result would be to increase the damages. The buyer would be liable only for the damages suffered up to that time. However, if the result of stopping performance at such time would be to increase the damages, the seller could continue. (Former C.C. 1784(4); see 52 *Harv. L. Rev.* 817; and see generally 1 *Summary* (10th), *Contracts*, §914 et seq.)

Under the Code, the seller, in disposing of unfinished goods, is required to exercise "reasonable commercial judgment for the purposes of avoiding loss and of effective realization." Accordingly, the seller may complete the manufacture, "cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner." (U.C.C. 2704(2), and see Official Comment 2; C.E.B., 2 UCC Sales and Leases, §17.35; 42 *A.L.R.3d* 182, 188.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Identification*. See 4A Lawrence's Anderson 3d (2006 ed.), §2-704:7.



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3. Withholding or Stoppage of Delivery.

4 Witkin Sum. Cal. Law Sales § 185

[§ 185] Withholding or Stoppage of Delivery.

(1) *Pre-Code "Stoppage in Transitu" and Seller's Lien.* Under the Sales Act, a seller who was still in possession of goods after title had passed to the buyer, had a *lien* or right to retain possession until payment if the buyer was insolvent. (Former C.C. 1773, 1774.) If the title had not yet passed, the seller had a similar right to *withhold delivery*. (See 4A Anderson 3d (1997 Rev. ed.), §2-703:45.) Where the goods were in transit, the seller could stop delivery and regain possession when the buyer was or became insolvent. After successful stoppage the seller had the same rights as if he or she had never parted with possession. (Former C.C. 1773(1)(b), 1777.) But when an insolvent buyer secured both possession and title, the seller had only the rights of an unsecured creditor unless circumstances existed warranting rescission of the sale for fraud. (See C.E.B., 2 UCC Sales and Leases, §17.25.)

(2) *Right To Stop Delivery Under Commercial Code.* A seller can stop delivery "when he discovers the buyer to be insolvent." (U.C.C. 2705(1); see *supra*, §182.) The right of stoppage is also available after a breach of contract by the buyer, such as a repudiation or failure to make a payment when due. Stoppage for breach, however, may only be exercised as to carload lots and other large deliveries. (See U.C.C. 2705(1), and Official Comment 1; C.E.B., 2 UCC Sales and Leases, §17.14; 67A *Am.Jur.2d* (2003 ed.), *Sales* §949 et seq.) The seller bears the expense and liability of stopping delivery. If successful, the seller has the same rights as to the goods as he or she had prior to delivery. (See U.C.C. 2705, Official Comments 5, 6; 4A Anderson 3d (1997 Rev. ed.), §2-705:3 et seq.)

A person "in the position of a seller" (*supra*, §181) has the same rights as a seller to stop delivery. (U.C.C. 2707(2); see 4A Anderson 3d (1997 Rev. ed.), §2-707:4 et seq.; on stoppage of goods sold by a middleman seller and shipped directly from the factory, see 4A Anderson 3d (1997 Rev. ed.), §2-705:9.)

(3) *Termination of Right.* The seller's right of stoppage terminates when the buyer receives the goods or a negotiable document of title covering them (U.C.C. 2705(2)(a), (2)(d)), or after appropriate acknowledgment has been made by a bailee that the goods are held for the buyer (see U.C.C. 2705(2)(b), (2)(c)). (See Official Comment 2; 4A Anderson 3d (1997 Rev. ed.), §2-705:40; C.E.B., 2 UCC Sales and Leases, §17.16; on effect of buyer's resale of goods in transit, see 4A Anderson 3d (1997 Rev. ed.), §2-705:11.) These limitations accord generally with pre-Code law, under which transfer to a bona fide purchaser for value by a negotiable document of title terminated the seller's right of stoppage. (See *Newhall v. Central Pac. R. Co.* (1876) 51 C. 345, 350; 5 *Cal. L. Rev.* 483.)

(4) *Procedure*. The seller must give notice sufficient "to enable the bailee by reasonable diligence to prevent delivery of the goods." (U.C.C. 2705(3)(a).) A bailee is not obliged to stop delivery until negotiable documents of title have been surrendered. (U.C.C. 2705(3)(c).) And, if a carrier has issued a nonnegotiable bill of lading, it is not obliged to obey a stop order from anyone other than the consignor. (U.C.C. 2705(3)(d); see 4A Anderson 3d (1997 Rev. ed.), §2-705:33 et seq.; C.E.B., 2 UCC Sales and Leases, §17.19.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Pre-Code "Stoppage in Transitu" and Seller's Lien*. See 4A Lawrence's Anderson 3d (2006 ed.), §2-703:37.

(2) *Right To Stop Delivery Under Commercial Code*. See 4A Lawrence's Anderson 3d (2006 ed.), §§2-705:5, 2-705:10, 2-707:8.

(3) *Termination of Right*. See 4A Lawrence's Anderson 3d (2006 ed.), §§2-705:12, 2-705:37 et seq. (4) *Procedure*. U.C.C. 2705(3)(c) was amended in 2006 to change "surrender of the document" to "surrender of possession or control of the document." (See 4A Lawrence's Anderson 3d (2006 ed.), §2-705:30 et seq.)



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4. Reclaim of Goods.

4 Witkin Sum. Cal. Law Sales § 186

[§ 186] Reclaim of Goods.

A seller may refuse to deliver to an insolvent buyer (see *supra*, §182) and may stop delivery (see *supra*, §185). The Code also permits a seller to *reclaim* goods for up to 10 days after the buyer's receipt of them when "the seller discovers that the buyer has received goods on credit while insolvent." (U.C.C. 2702(2), and see Official Comment 2; 4A Anderson 3d (1997 Rev. ed.), §2-702:22 et seq.; C.E.B., 2 UCC Sales and Leases, §17.24 et seq.; 44 *U.C.L.A. L. Rev.* 247 [credit seller's right to reclaim goods sold to insolvent purchaser]; 17 *A.L.R.3d* 1010, 1096.) (On right of *cash seller* to reclaim goods sold in a "bad check" transaction, see *supra*, §156.) If a "misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the 10-day limitation does not apply." (U.C.C. 2702(2).)

The right to reclaim goods from an insolvent buyer is "subject to the rights of a buyer in ordinary course or other good faith purchaser" under U.C.C. 2403 (*supra*, §136). (U.C.C. 2702(3); for effect of U.C.C. 2702 on rights of buyers' creditors generally, see 79 *Harv. L. Rev.* 598; C.E.B., 2 UCC Sales and Leases, §17.30.)

Except for the remedy provided a seller by U.C.C. 2702, the seller may not "base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay." (U.C.C. 2702(2).) And because the right to reclaim goods "constitutes preferential treatment as against the buyer's other creditors" (Official Comment 3), "[s]uccessful reclamation of goods excludes all other remedies with respect to them." (U.C.C. 2702(3).)

West's Key Number Digest, Sales k.391(5)

SUPPLEMENT: [This section is current through the latest supplement]
See 4A Lawrence's Anderson 3d (2006 ed.), §2-702:21 et seq.



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5. Resale.

4 Witkin Sum. Cal. Law Sales § 187

[§ 187] Resale.

A seller in possession of goods that are identified to a contract of sale or are identifiable to it pursuant to U.C.C. 2704 (see *supra*, §184), may, after breach of that contract by the buyer, resell the goods and thus determine the damages chargeable to the buyer. (U.C.C. 2706(1), and see Official Comment 3; C.E.B., 2 UCC Sales and Leases, §17.38 et seq.; 19 *Santa Clara L. Rev.* 285 [Seller's Conflicting Default Rights Under Articles 2 and 9]; 101 *A.L.R.5th* 563; 67A *Am.Jur.2d* (2003 ed.), *Sales* §969 et seq.; on resale of goods *received* by seller in payment, see U.C.C. 2718(4).)

Because the purpose of resale is to dispose of the goods at the best price obtainable, the reselling seller may "depart from the terms and conditions of the original contract for sale to any extent 'commercially reasonable' in the circumstances." (U.C.C. 2706, Official Comment 6; see *Allied Grape Growers v. Bronco Wine Co.* (1988) 203 *C.A.3d* 432, 447, 249 *C.R.* 872, 13 *Summary* (10th), *Equity*, §117 [plaintiff grape grower's sale of crop to subsidiary corporation it had created after defendant breached purchase contract was in good faith and commercially reasonable, in absence of alternative market for crop].) Procedural requirements are set forth in U.C.C. 2706(2), (3) and (4) and the Official Comments to that section. (See 4A *Anderson* 3d (1997 Rev. ed.), §2-706:29 et seq.; *Cal. Transactions Forms*, 4 *Business Transactions* §24:407 et seq.) A seller who complies with these requirements and resells "in good faith and in a commercially reasonable manner" may base his or her damages on the resale price. (U.C.C. 2706(1); see *infra*, §189.) If any profit is made on resale, the seller is not accountable to the buyer for it. (See U.C.C. 2706(6).) But "a person in the position of a seller" (see *supra*, §181), or a buyer with a security interest who resells goods, must account for proceeds in excess of his or her security interest. (U.C.C. 2706(6).)

"A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements" of the resale provisions of the Code. (U.C.C. 2706(5), and see Official Comment 10.)

SUPPLEMENT: [This section is current through the latest supplement]
See 4A *Lawrence's Anderson* 3d (2006 ed.), §2-706:25 et seq.



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6. Damages for Nonacceptance or Repudiation.

a. In General.

4 Witkin Sum. Cal. Law Sales § 188

[§ 188] In General.

(1) *When Remedy Is Available.* Where the buyer has the goods or is chargeable for their loss or diminution in value, the seller is entitled to the contract price (see *infra*, §192). But where the buyer has repudiated the contract, wrongfully rejected the goods, or unjustifiably revoked acceptance of them, the seller's remedy is damages, computed under one of the Code theories (see *infra*, §189 et seq.). (For an exhaustive study of damages in sales contracts under the Commercial Code and under pre-Code law, see *18 Stanf. L. Rev.* 66, 553; see also *42 A.L.R.3d* 182 [damages where buyer breaches contract for sale of specially manufactured goods before completion of manufacture]; *67A Am.Jur.2d* (2003 ed.), *Sales* §992 et seq.)

(2) *Incidental Damages.* Regardless of the applicable measure of damages, the seller may be additionally entitled to incidental damages. (See U.C.C. 2706(1), 2708(1), (2).) These include "any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyers' breach, in connection with return or resale of the goods or otherwise resulting from the breach." (U.C.C. 2710, and Official Comment.) They may also be recovered by one "in the position of a seller." (U.C.C. 2707(2); see *supra*, §181.)

(3) *Consequential Damages.* These are *not available* to the seller; the Code permits consequential damages only where specifically provided for by law. (See U.C.C. 1106(1); *4A Anderson* 3d (1997 Rev. ed.), §2-710:5; C.E.B., 2 UCC Sales and Leases, §18.8; cf. U.C.C. 2715, *infra*, §206 [allowing consequential damages to aggrieved *buyers*].)

(4) *Liquidated Damages.* The parties may stipulate damages within limits. (See *infra*, §212.) And the seller may sometimes claim a forfeited deposit. (See *supra*, §183.)

(5) *Special and Penal Damages.* Special and penal damages are not recoverable except where specifically provided for by the Code or by other applicable law. (U.C.C. 1106, and see Official Comment 3; *1 Anderson* 3d (2003 Rev. ed.), §1-106:17; for restrictions on unreasonable and punitive damages generally, see *1 Summary* (10th), *Contracts*, §874 et seq.)

(6) *Minimizing Damages.* To the extent that an aggrieved seller's treatment and disposition of goods identified to the contract can affect the burden of the buyer's damages, the seller must act in accordance with the Code's general

obligation of good faith. (U.C.C. 1203, and see Official Comment; see also U.C.C. 2706, Official Comment 2; 1 *Summary* (10th), *Contracts*, §914 et seq.)

West's Key Number Digest, Sales k.418(1)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Consequential Damages*. See 4A Lawrence's *Anderson* 3d (2006 ed.), §2-710:4.

(5) *Special and Penal Damages*. U.C.C. 1106 was renumbered U.C.C. 1305 in 2006 without substantive change.

(6) *Minimizing Damages*. U.C.C. 1203, on the general obligation of good faith, was renumbered U.C.C. 1304 in 2006.



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6. Damages for Nonacceptance or Repudiation.

b. Measure of Damages.

1. Based on Resale Proceeds.

4 Witkin Sum. Cal. Law Sales § 189

[§ 189] Based on Resale Proceeds.

When an aggrieved seller has resold goods in conformance with the requirements of U.C.C. 2706 (see *supra*, §187), "in good faith and in a commercially reasonable manner," the seller may recover the difference between the resale price and the contract price together with incidental expenses, "less expenses saved in consequence of the buyer's breach." (U.C.C. 2706(1); see 4A Anderson 3d (1997 Rev. ed.), §2-706:76; 61 *Harv. L. Rev.* 150; 42 *A.L.R.3d* 182.) Where resale is at a price lower than the market price, the buyer's liability will be accordingly increased. But a large discrepancy between the two figures would bring into question the commercial reasonableness of the resale, and a seller who fails to fully conform to all requirements of U.C.C. 2706 forfeits the right to this measure of damages. (See U.C.C. 2706, Official Comment 2; C.E.B., 2 UCC Sales and Leases, §18.5.)

Decisions under the Sales Act recognized the right to recover the difference between the contract price and the proceeds of resale. (See *Fischer v. Means* (1948) 88 *C.A.2d* 137, 142, 198 *P.2d* 389 [after buyer's wrongful refusal to accept crop of squash and spoilage of crop, seller was entitled to contract price less salvage proceeds from resale of unspoiled squash]; *Louis Weinberg Associates v. Newman* (1954) 123 *C.A.2d* 333, 335, 266 *P.2d* 610; see also *Cuthill v. Peabody* (1912) 19 *C.A.* 304, 308, 125 *P.* 926 [recognizing right of aggrieved seller to resell property "as the agent of the vendee"].)

SUPPLEMENT: [This section is current through the latest supplement]
See 4A Lawrence's Anderson 3d (2006 ed.), §2-706:76.



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2. Based on Market Price.

4 Witkin Sum. Cal. Law Sales § 190

[§ 190] Based on Market Price.

Where the aggrieved seller does not establish damages by resale, the standard measure of damages is "the difference between the market price at the time and place for tender and the unpaid contract price" plus incidental damages "but less expenses saved in consequence of the buyer's breach." (U.C.C. 2708(1), and see Official Comment 1; 4A Anderson 3d (1997 Rev. ed.), §2-708:3 et seq.; C.E.B., 2 UCC Sales and Leases, §§14.3, 14.4; 42 A.L.R.3d 191; on problems in determining market price, see *infra*, §210.) But if a seller's action for *anticipatory repudiation* comes to trial before the time at which any part of the performance was due, market price is calculated as of the time that the seller learned of the repudiation. (U.C.C. 2723(1); see C.E.B., 2 UCC Sales and Leases, §18.3.)

The market value criterion was also the basic standard of damages under the Sales Act. (Former C.C. 1784(3); see *Rice v. Schmid* (1941) 18 C.2d 382, 388, 115 P.2d 498; *O'Hare v. Peacock Dairies* (1938) 26 C.A.2d 345, 358, 79 P.2d 433 [applying market price criterion to contract to purchase milk produced by a dairy]; *Samuels v. L.A. Mattress Co.* (1951) 102 C.A.2d 827, 830, 228 P.2d 593.)

SUPPLEMENT: [This section is current through the latest supplement]
See 4A Lawrence's Anderson 3d (2006 ed.), §2-708:8.



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b. Measure of Damages.

3. Lost Profits.

4 Witkin Sum. Cal. Law Sales § 191

[§ 191] Lost Profits.

In many sales transactions, the market price will be equal to the contract price, and the aggrieved seller can sell elsewhere at the contract price. In this situation, the resale or market price theories of damages do not provide full compensation, because the seller, who could have made two profitable sales, has only made one. (See *18 Stanf. L. Rev.* 66, 553; *24 A.L.R.2d 1008* [measure of damages where seller is dealer or manufacturer's agent].)

(1) *Pre-Code Theory*. The market value standard of the Sales Act applied only where there was an available market for the goods and "in the absence of special circumstances showing proximate damage of a greater amount." (Former C.C. 1784(3).) Where the contemplated profit was the difference between the seller's own cost of acquiring the goods and the contract price, the "special circumstances" required this measure of damages and market value was immaterial. (See *Patty v. Berryman* (1949) 95 C.A.2d 159, 171, 212 P.2d 937 [seller contracted to acquire prefabricated houses to sell to buyer]; *Los Angeles Coin-O-Matic Laundries v. Harow* (1961) 195 C.A.2d 324, 332, 334, 15 C.R. 693 [seller was dealer in equipment for laundromats and there was no available market for such equipment]; *Irving Tier Co. v. Griffin* (1966) 244 C.A.2d 852, 867, 871, 53 C.R. 469 [middleman who could obtain unlimited supply from wholesaler suffered irreplaceable loss of profits when buyer repudiated; recovery allowed under general contract damages rule of C.C. 3300].)

(2) *Commercial Code*. The Code permits a calculation of damages to be based on "the profit (including reasonable overhead) which the seller would have made from full performance by the buyer," whenever damages measured by market price or resale proceeds are "inadequate to put the seller in as good a position as performance would have done." (U.C.C. 2708(2), and see Official Comment 2; *National Controls v. Commodore Business Machines* (1985) 163 C.A.3d 688, 697, 209 C.R. 636; *31 Stanf. L. Rev.* 323 [The Lost-Profits Puzzle]; *37 Stanf. L. Rev.* 1109 [Lost-Profits Damage Awards Under U.C.C. 2-708(2)]; C.E.B., 2 UCC Sales and Leases, §18.10 et seq.; *42 A.L.R.3d 182, 191*.) The damages include incidental expenses and "due allowance for costs reasonably incurred" less "due credit for payments or proceeds of resale." (U.C.C. 2708(2).)

U.C.C. 2708(2) was intended to continue the exception to the market price rule in special circumstances. Accordingly, it is applicable where the seller is a middleman. (*Distribu-Dor v. Karadanis* (1970) 11 C.A.3d 463, 470,

90 C.R. 231.)

In *National Controls v. Commodore Business Machines*, *supra*, plaintiff manufacturer sued defendant buyer for breach of a contract to purchase business scales. Defendant had ordered 900 scales, but accepted and paid for only 50. The trial court awarded plaintiff the profit it would have made on the sale of the 850 scales to defendant, notwithstanding plaintiff's subsequent resale of those scales to another customer. *Held*, affirmed.

(a) When a buyer repudiates a fixed price contract to purchase goods, U.C.C. 2708(2) permits a seller to recover lost profits upon establishing that he or she is a "lost volume" seller, i.e., a seller who would have made the sale to a third party regardless of the buyer's breach. Here, at the time of defendant's breach, plaintiff's manufacturing plant was operating at 40% capacity; the production of the 900 units did not tax that capacity; and the plant could have more than doubled its output and still stayed within its capacity. Thus, if there had been no breach by defendant, plaintiff would have had the benefit of *both* the original contract with defendant and the resale contract with the other customer. (163 C.A.3d 699.)

(b) Defendant was not entitled under U.C.C. 2708(2) to "due credit for payments or proceeds of resale." Despite the literal language of U.C.C. 2708(2), it is not applicable in the case of a lost volume seller. Applying the "due credit" provision in this case would result in plaintiff recovering only the profit made on resale plus the difference between the resale price and the contract price, an almost identical measure to U.C.C. 2708(1) (*supra*, §190). Thus, the damage measure of lost profits would be rendered nugatory, and plaintiff would not be placed in as good a position as if defendant had performed. Accordingly, plaintiff was entitled to its lost profits on the contract with defendant, without any setoff for profits on the resale to plaintiff's other customer. (163 C.A.3d 698, 699.)

(3) *Lost Overhead*. The general costs of doing business must be recovered from sales, and a repudiated sale increases this load on other sales. The Code recognizes this factor by providing for the addition of reasonable overhead to damages based on lost profits. (U.C.C. 2708(2); see *Distribu-Dor v. Karadanis*, *supra*, 11 C.A.3d 471; C.E.B., 2 UCC Sales and Leases, §§18.11, 18.14.)

West's Key Number Digest, Sales k.428(15)

SUPPLEMENT: [This section is current through the latest supplement]



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7. Action for Price.

4 *Witkin Sum. Cal. Law Sales* § 192

[§ 192] Action for Price.

The Code provides three situations in which, on the buyer's failure to pay the contract price, the seller may recover that amount plus incidental damages:

(1) *When the buyer has accepted the goods.* (U.C.C. 2709(1)(a); see former C.C. 1783(1) [similar]; *Johnson v. Besoyan* (1948) 85 C.A.2d 389, 393, 193 P.2d 63.)

(2) *When conforming goods have been lost or damaged* within a "commercially reasonable time after risk of their loss has passed to the buyer." (U.C.C. 2709(1)(a); see C.E.B., 2 UCC Sales and Leases, §18.17 et seq.; supra, §154.)

(3) *When goods have been identified to the contract* and the seller is "unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing." (U.C.C. 2709(1)(b); cf. former C.C. 1783(3) [permitting an action for price as to goods that "cannot readily be resold for a reasonable price"]; 6 *Cal. L. Rev.* 60.) The test is intended to be an objective one. (Official Comment 3.)

A seller who sues for the price of goods that are identified to the contract and in the seller's control, must hold the goods for the buyer until payment of the judgment. If a resale of the goods should become possible "he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold." (U.C.C. 2709(2); see C.E.B., 2 UCC Sales and Leases, §18.18; 67A *Am.Jur.2d* (2003 ed.), *Sales* §1015 et seq.)

U.C.C. 2709 is intended to limit the situations in which an action for price will lie. (Official Comment 6.) A seller who has failed to establish a right to recovery of the contract price is entitled to damages for nonacceptance under U.C.C. 2708 (supra, §188 et seq.). (See U.C.C. 2709(3), and Official Comment 7; 42 *A.L.R.3d* 182, 190.)

Under the Sales Act, an action for the price could be maintained before title had passed where the price was payable on a *day certain* unless it appeared that the seller was unable or unwilling to perform. (Former C.C. 1783(2); see 5 *Cal. L. Rev.* 483.) The Commercial Code eliminates this rule. (See U.C.C. 2709, Official Comments 1, 2.)

West's Key Number Digest, Sales k.418(3)

SUPPLEMENT: [This section is current through the latest supplement]



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1. In General.

4 Witkin Sum. Cal. Law Sales § 193

[§ 193] In General.

U.C.C. 2711 and U.C.C. 2714 index the buyer's remedies. (See U.C.C. 2711, Official Comment 1; 3 Williston on Sales (5th), §25-1 et seq.; Cal. Civil Practice, 4 Business Litigation, §40.51 et seq.; Cal. Transactions Forms, 4 Business Transactions §24:447 et seq.; 67A Am.Jur.2d (2003 ed.), Sales §1034 et seq.; on federal remedies of consumer buyers under the Magnuson-Moss Warranty Act (15 U.S.C., §2301 et seq.), see *infra*, §327.)

(1) *On Rejecting Goods*. Where the buyer rightfully rejects goods or justifiably revokes acceptance of them, the buyer may cancel as to the goods involved or, where the nonconformity of an installment substantially impairs the value of the whole contract, may cancel the whole contract. (U.C.C. 2711(1); *Music Acceptance Corp. v. Lofing* (1995) 32 C.A.4th 610, 622, 39 C.R.2d 159 [once seller breached implied warranty of merchantability by delivering unplayable piano, buyer had right to cancel contract, receive his money back, and be relieved of any further obligations]; see *Mocek v. Alfa Leisure* (2003) 114 C.A.4th 402, 407, 7 C.R.3d 546 [where defects in trailer's electrical system constituted breach of warranty of merchantability, purchaser was entitled to return trailer to seller and recover purchase price plus interest; C.C. 1793.2(d), *infra*, §318, did not require purchaser to give seller opportunity to repair, as that subdivision applies only to express warranty breaches].) Whether or not the right to cancel is invoked, the buyer may "cover" (see *infra*, §194) and recover damages (see *infra*, §195). (On nonconforming delivery generally, see *supra*, §159 et seq.; on seller's right to cure nonconformities, see *supra*, §147.) A buyer in possession of rejected goods may have a *security interest* in them. (U.C.C. 2711(3); see *supra*, §163.)

(2) *On Seller's Failure To Deliver*. Where the seller fails to deliver or repudiates, the buyer may exercise the rights available to a buyer following rejection. (See U.C.C. 2711(1), *supra*.) Alternatively, the buyer may recover identified goods as provided in U.C.C. 2502 (*supra*, §142), or obtain specific performance or replevy the goods (*infra*, §209), and recover damages for any incidental and consequential losses (*infra*, §206).

(3) *On Acceptance of Nonconforming Delivery*. Where accepted goods do not conform to a warranty, the buyer may recover damages for breach of warranty (*infra*, §198 et seq.). For other nonconformities with respect to an accepted delivery, the buyer may recover damages as provided by U.C.C. 2714(1) (*infra*, §197). And in either case the buyer may have a right to incidental and consequential damages (*infra*, §206).

(4) *On Breach After Payment*. Where the seller breaches and the buyer cancels, the buyer may recover "so much of

the price as had been paid," in addition to exercising any other available remedies. (U.C.C. 2711(1).) Where the *buyer breaches* and the seller cancels, the buyer is entitled to restitution of payments made, *after* deduction of the forfeited deposit accorded the seller by statute (see *supra*, §183), and subject to *offset* to the extent that the seller can establish (a) a right to recover other damages (U.C.C. 2718(3)(a)), or (b) the amount or value of any benefits that the buyer has received, directly or indirectly, by reason of the contract (U.C.C. 2718(3)(b)). (See 4A Anderson 3d (1997 Rev. ed.), §2-718:32 et seq.; C.E.B., 2 UCC Sales and Leases, §18.49; on availability of restitution to breaching party, see 13 *Summary* (10th), *Equity*, §63 et seq.)

West's Key Number Digest, Sales k.390

SUPPLEMENT: [This section is current through the latest supplement]

See C.E.B., Law of Contracts §§12.25 et seq., 12.64 et seq.(4) *On Breach After Payment*. See 4A Lawrence's Anderson 3d (2006 ed.), §2-718:32 et seq.



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2. Cover.

4 Witkin Sum. Cal. Law Sales § 194

[§ 194] Cover.

(1) *In General.* A buyer will usually buy similar or substitute goods, and, under the Sales Act, could recover the difference between the contract and *market price*; i.e., the buyer could not recover the amount actually paid for substitute goods if they cost more than the market price. The Code remedy of "cover" gives the buyer the right to recover the cost of a good faith purchase of substitute goods made without unreasonable delay. (U.C.C. 2712(1), (2), and see Official Comments 1, 2; see also 4A Anderson 3d (1997 Rev. ed.), §2-712:3 et seq.; C.E.B., 2 UCC Sales and Leases, §17.67 et seq.; 33 *San Diego L. Rev.* 175 [discussing "avoidable consequences" doctrine and pertinent Code provisions]; 79 *A.L.R.4th* 844 [what constitutes "cover" under U.C.C. 2712]; 67A *Am.Jur.2d* (2003 ed.), *Sales* §1039; 12 *Proof of Facts* 2d 145 [good faith and commercial reasonableness of buyer's cover].)

Cover is an alternative remedy (U.C.C. 2712(3)); i.e., the buyer may instead sue for damages for nondelivery under U.C.C. 2713. In that event, however, consequential damages that could have been prevented by cover are not recoverable. (U.C.C. 2715(2); see *Gerwin v. Southeastern Calif. Assn. of Seventh Day Adventists* (1971) 14 *C.A.3d* 209, 218, 92 *C.R.* 111; U.C.C. 2712, Official Comment 3; *infra*, §206.) Cover is available to the buyer whether or not all the goods affected have been identified to the contract. (U.C.C. 2711(1)(a).)

(2) *Effect of "Cost Plus" Contracts.* In *KGM Harvesting Co. v. Fresh Network* (1995) 36 *C.A.4th* 376, 42 *C.R.2d* 286, a lettuce grower breached its contract to sell lettuce to a lettuce broker for 9 cents a pound, choosing instead to sell the lettuce to others for a higher price. The broker retaliated by refusing to pay for lettuce that had already been delivered, and the grower sued. The broker, which had been forced to go into the open market to acquire lettuce at a higher price, cross-complained for its contract-cover differential under U.C.C. 2712. The parties stipulated at trial that the grower was entitled to a directed verdict on its complaint. On the broker's cross-complaint, the jury determined that the grower breached the contract, performance was not excused, and the broker was entitled to its contract-cover differential. *Held*, affirmed.

(a) The broker, as a result of having "cost plus" contracts with its own buyer, was able to pass on most of its extra expenses resulting from the breach. The grower pointed out that strict application of U.C.C. 2712 therefore put the broker in a *better* position than if a breach never occurred. In order to avoid this windfall, the grower argued, the broker's damages under U.C.C. 2712 should be limited by postbreach events (i.e., the reduction in extra expenses resulting from the cost plus contracts). However, when they entered into their contract, both parties were aware that the

price of lettuce might fluctuate. Additionally, the grower was aware of the broker's cost plus contracts, and knew that if it breached, the broker would have to obtain replacement lettuce elsewhere. Because the price of lettuce had risen at the time of breach, the broker had to pay more than 9 cents a pound. "Only by reimbursing buyer for the additional costs above 9 cents a pound could buyer truly receive the benefit of the bargain. This is the measure of damages set forth in section 2712." (36 C.A.4th 383.)

(b) Relying on *Allied Cannery & Packers v. Victor Packing Co.* (1984) 162 C.A.3d 905, 209 C.R. 60, *infra*, §195, the grower argued that the "remedial injunction" of U.C.C. 1106 to put the aggrieved party in as good a position as if the other party had fully performed demanded that the broker's recovery be limited by what it saved under the cost plus contracts. *Allied Cannery* was a contract-market case under U.C.C. 2713, and the court in that case, noting that the seller had not acted in bad faith and that the buyer had either been released from its contracts with *its* buyers or at least had not been sued by them, held that U.C.C. 1106 should limit the buyer's recovery under U.C.C. 2713. "[W]e have serious reservations about whether the result in *Allied Cannery*, with its emphasis on the good faith of the breaching party, is appropriate in an action seeking damages under section 2713. We have no reservations, however, in not extending the *Allied Cannery* rationale to a section 2712 case. ... [N]o section 2712 case ... has ever held that cover damages must be limited by section 1106. The obvious reason is that the cover-contract differential puts a buyer who covers in the exact same position as performance would have done. ... [I]t gives the buyer the benefits of its bargain. What the buyer chooses to do with that bargain is not relevant to the determination of damages under section 2712." (36 C.A.4th 389.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See 4A Lawrence's Anderson 3d (2006 ed.), §2-712:17 et seq.

(2) *Effect of "Cost Plus" Contracts.* U.C.C. 1106, stating the policy of putting the aggrieved party in as good a position as if the other party had fully performed, was renumbered U.C.C. 1305 in 2006 without substantive change.



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C. Remedies of Buyer.

3. Damages.

a. Nondelivery or Repudiation.

1. Based on Market Price or Cover.

4 Witkin Sum. Cal. Law Sales § 195

[§ 195] Based on Market Price or Cover.

After a seller's failure to deliver acceptable goods an aggrieved buyer may "cover" to obtain the goods and measure his or her damages by the cost of covering. (See *supra*, §194.) If the buyer does not cover, the measure is the difference between the market price and the contract price, together with appropriate incidental damages (see *infra*, §206), but less any "expenses saved in consequence of the seller's breach." (U.C.C. 2713(1), and see Official Comment 5; 22 Cal. Western L. Rev. 233 [defense of buyers' expectancy damages under Unif.Com.C. 2-713]; 57 So. Cal. L. Rev. 667 [defending contract-market differential as accurate compensatory remedy]; C.E.B., 2 UCC Sales and Leases, §18.21; 94 A.L.R.2d 1215 [allegation of buyer's ability and willingness to perform]; 67A Am.Jur.2d (2003 ed.), Sales §1136 et seq.)

Market price is the price obtaining at the time the buyer learns of the breach. (U.C.C. 2713(1); cf. former C.C. 1787(3) [under Sales Act price was determined as of time goods ought to have been delivered if contract specified time for delivery]; see 11 U.C.L.A. L. Rev. 125.) If the goods arrive but the buyer rejects them or revokes acceptance, market price is determined as of the place of arrival; otherwise, the price is determined as of the place for tender. (U.C.C. 2713(2), and see Official Comment 1.)

The Official Comments to U.C.C. 2713 specify rules for establishing market price. Ideally it will be "the price for goods of the same kind and in the same branch of trade." (Official Comment 2.) It may be necessary, however, to permit a showing of a comparable market price pursuant to U.C.C. 2723(2) (see *infra*, §210), or of prices of spot sales. (U.C.C. 2713, Official Comment 3.) If the difficulty of determining market price is a result of a scarcity of goods, the buyer may have recourse to the remedy of specific performance (see *infra*, §209), or may be permitted in the damages action to introduce opinion evidence as to the value of the goods. (Official Comment 3.)

A buyer may not always be entitled to the difference between the market and contract prices. In *Allied Cannery & Packers v. Victor Packing Co.* (1984) 162 C.A.3d 905, 209 C.R. 60, defendant seller breached a contract to deliver raisins to plaintiff buyer who intended to resell them to a foreign importer. Damages were awarded to plaintiff in an amount equal to its expected gain on resale, rather than the difference between the market and contract prices. *Held*, affirmed.

(a) In this case rains had damaged the raisin crop, and the market price had risen to such a height that, although plaintiff's actual lost profit on the resale transaction was \$ 4,462.50, application of the market-contract price formula would yield damages of approximately \$ 150,000. (162 C.A.3d 912.) Hence, where, as here, plaintiff buyer could not show that it would be liable in damages to the importer, and defendant seller was not shown to have acted in bad faith, "the policy of section 1106, subdivision (1), that the aggrieved party be put in as good a position as if the other party had performed, requires that the award of damages to the buyer be limited to its actual loss, the amount it expected to make on the transaction." (162 C.A.3d 915.)

(b) Windfall damages to the plaintiff were not necessary in order to prevent unjust enrichment to a defendant who was in deliberate breach of contract, as was the case in *Sun-Maid Raisin Growers of Calif. v. Victor Packing Co.* (1983) 146 C.A.3d 787, 194 C.R. 612, *infra*, §196, where the seller had exhibited bad faith by gambling on the market price of raisins in deciding whether to perform its contract to sell. (162 C.A.3d 916.) (See *KGM Harvesting Co. v. Fresh Network* (1995) 36 C.A.4th 376, 389, 42 C.R.2d 286, *supra*, §194 [disagreeing with *Allied Cannerys* holding that buyer's recovery should be limited by U.C.C. 1106 where seller did not act in bad faith and buyer is not liable in turn to its buyers].)

SUPPLEMENT: [This section is current through the latest supplement]

Policy of putting aggrieved party in as good a position as if other party fully performed: U.C.C. 1106(1) was renumbered U.C.C. 1305(a) in 2006 without substantive change.



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3. Damages.

a. Nondelivery or Repudiation.

2. Lost Profits.

4 Witkin Sum. Cal. Law Sales § 196

[§ 196] Lost Profits.

(1) *Pre-Code Law*. The Sales Act permitted an aggrieved buyer to recover damages based on either market price or the reasonable market value of substitute goods. (See former C.C. 1787, 3354; *Olcese v. Davis* (1954) 124 C.A.2d 58, 61, 268 P.2d 175; 61 Harv. L. Rev. 151.) But if the goods were not available in the market and the buyer could not obtain a reasonable substitute, the measure of damages was the buyer's loss of *prospective net profits*. (*Coates v. Lake View Oil & Refining Co.* (1937) 20 C.A.2d 113, 117, 66 P.2d 463; *Morello v. Growers Grape Products Assn.* (1947) 82 C.A.2d 365, 375, 186 P.2d 463; *Panno v. Russo* (1947) 82 C.A.2d 408, 415, 186 P.2d 452; *Walpole v. Prefab Mfg. Co.* (1951) 103 C.A.2d 472, 481, 230 P.2d 36; *House Grain Co. v. Finerman & Sons* (1953) 116 C.A.2d 485, 496, 253 P.2d 1034; *Olcese v. Davis*, *supra*, 124 C.A.2d 63; see 61 Harv. L. Rev. 151.)

(2) *Commercial Code*. The Code permits recovery of lost profits as *consequential damages*. (See U.C.C. 2715, Official Comment 2; 92 Harv. L. Rev. 1395 [Limiting the Buyer's Market Damages to Lost Profits]; 52 So. Cal. L. Rev. 1727 [The Buyer's Dilemmas].) A limitation on this recovery similar to that under the Sales Act is provided in U.C.C. 2715(2)(a), which bars consequential damages where the loss could have been avoided by "cover." (See *infra*, §206.)

In *Sun-Maid Raisin Growers of Calif. v. Victor Packing Co.* (1983) 146 C.A.3d 787, 194 C.R. 612, plaintiff buyer sued defendant seller for breach of a contract to sell raisins from the 1975 crop. Defendant contended that an award of more than \$ 295,000 for lost profits was excessive because the *amount* of lost profits was unforeseeable at the time the contract was made. *Held*, the award was properly based on the market price of raisins in December 1976, even though it was nearly double the 1975 price due to "disastrous" rain damage to the 1976 crop.

(a) Defendant repudiated the contract in August 1976, and failed to object to the use of the December price as a proper alternative market price under U.C.C. 2723(2). It "had reason to know," under U.C.C. 2715(2)(a), that failure to timely deliver raisins would result in lost profits on resales by plaintiff. In addition, the possibility of disastrous rain damage to the 1976 raisin crop was also clearly foreseeable. (146 C.A.3d 793, 794.)

(b) Plaintiff could not have reduced its damages by purchasing, reconditioning, and reselling damaged raisins (the only type available to it) inasmuch as the cost of "covering" in this manner exceeded the amount awarded for lost

profits. (146 C.A.3d 792.)

West's Key Number Digest, Sales k.418(5)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Commercial Code*. See *Green Wood Industrial Co. v. Forceman Int. Dev. Group* (2007) 156 C.A.4th 766, 772, 67 C.R.3d 624 [in action for fraud and negligence in which plaintiff buyer alleged that it was induced to pay for goods that did not exist, award of lost profits as consequential damages under U.C.C. 2715 was proper; plaintiff introduced substantial evidence of lost profits based on resale contract it had concluded with third party, and defendant seller's agent offered no evidence that plaintiff failed to mitigate these damages].



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b. Nonconformities.

4 Witkin Sum. Cal. Law Sales § 197

[§ 197] Nonconformities.

Acceptance of a nonconforming tender gives the buyer a right to damages even though the nonconformity does not amount to breach of warranty. The aggrieved buyer is entitled to "the loss resulting in the ordinary course of events from the seller's breach as determined in any manner that is reasonable." (U.C.C. 2714(1), and see Official Comment 2; 4A Anderson 3d (1997 Rev. ed.), §2-714:91 et seq.; C.E.B., 2 UCC Sales and Leases, §18.25; C.E.B., Breach of Contract Remedies, §3.134; on measure of damages where delivery is delayed, see *A.A. Baxter Corp. v. Colt Industries* (1970) 10 C.A.3d 144, 154, 88 C.R. 842.) This standard is similar to one of the standards for measuring damages available to an aggrieved buyer for breach of warranty. (See *infra*, §203.)

SUPPLEMENT: [This section is current through the latest supplement]
See 4A Lawrence's Anderson 3d (2006 ed.), §2-714:105 et seq.



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c. Breach of Warranty.

1. In General.

4 Witkin Sum. Cal. Law Sales § 198

[§ 198] In General.

(1) *Basic Rule.* Under the Commercial Code, as under the Sales Act, the seller is liable for damages for breach of warranty notwithstanding acceptance of the goods, provided that the buyer gives notice of the breach within a reasonable time. (See U.C.C. 2714, 2607(3)(A), (4); former C.C. 1769; *North Alaska Salmon Co. v. Hobbs, Wall & Co.* (1911) 159 C. 380, 387, 113 P. 870, 120 P. 27; *Reininger v. Eldon Mfg. Co.* (1952) 114 C.A.2d 240, 244, 250 P.2d 4 [buyer's right to damages not destroyed by attempt, after seller's failure to correct defects, to have qualified third person correct them]; Clark & Smith, *The Law of Product Warranties*, Chap. 7; C.E.B., 2 UCC Sales and Leases, §18.25; BAJI, Nos. 9.40 et seq., 9.85; 4 *Hastings L. J.* 211; 8 *U.C.L.A. L. Rev.* 328; 66 *A.L.R.3d* 1162 [seller's promises or attempts to repair as affecting buyer's duty to minimize damages]; 94 *A.L.R.3d* 583 [measure of damages in action for breach of warranty of title]; 37 *A.L.R.4th* 110 [breach of warranty in sale of computer]; 67A *Am.Jur.2d* (2003 ed.), *Sales* §1095 et seq.; 6 *Am.Jur.* P.P. Forms (Rev. ed.), Commercial Code, Form 2:687 et seq.)

(2) *Election of Remedy.* Under the Sales Act, the buyer was required to elect one of several remedies for breach of warranty. (Former C.C. 1789(2).) The election requirement was much criticized, and is explicitly rejected in the Commercial Code. (See U.C.C. 2601, Official Comment 1; U.C.C. 2608, Official Comment 1; *Seely v. White Motor Co.* (1965) 63 C.2d 9, 14, 45 C.R. 17, 403 P.2d 145, 6 *Summary* (10th), *Torts*, §1514; 8 *U.C.L.A. L. Rev.* 328.) Remedies provided in the Song-Beverly Consumer Warranty Act (see *supra*, §52) are also cumulative and do not restrict "any remedy that is otherwise available." (C.C. 1790.4.)

(3) *Accrual of Cause of Action.* The cause of action for breach of warranty normally accrues when tender of delivery is made, and the statute of limitations begins to run at that time. But, as to some goods, the warranty may explicitly extend to *future performance* and discovery of a breach may not be possible until the time of such performance; in this event, the cause of action accrues "when the breach is or should have been discovered." (U.C.C. 2725(2); see *Carrau v. Marvin Lumber & Cedar Co.* (2001) 93 C.A.4th 281, 291, 112 C.R.2d 869 [defendant window manufacturer's advertisements indicating that its products were durable and long lasting did not render future performance exception applicable; that exception "applies only when the seller explicitly has agreed to warrant its product for a defined period of time"]; 81 *A.L.R.5th* 483 [what constitutes warranty explicitly extending to future performance]; 67A *Am.Jur.2d* (2003 ed.), *Sales* §870 et seq.; 3 *Cal. Proc.* (4th), *Actions*, §§499, 500.) The same result

was obtained under the Sales Act by characterizing such a warranty as of *prospective* rather than of present quality. (See *Ackerman v. A. Levy & J. Zentner Co.* (1935) 7 C.A.2d 23, 25, 45 P.2d 386 [nursery stock and seed]; *Southern Calif. Enterprises v. D. N. & E. Walter & Co.* (1947) 78 C.A.2d 750, 754, 178 P.2d 785 [carpet]; 21 So. Cal. L. Rev. 429; 3 Cal. Proc. (4th), Actions, §500.)

(4) *Recoupment*. Damages for breach of warranty may be deducted from any part of the price still due on the contract. (See *infra*, §208.)

(5) *Stipulation of Remedy*. The contract may limit the seller's liability for breach of warranty by stipulating the remedy available pursuant to the terms of U.C.C. 2719, provided that the stipulation and the circumstances are within the limitations of that section. (See *infra*, §211.) However, sales subject to the Song-Beverly Consumer Warranty Act (*supra*, §52) carry warranties that may not be waived by the buyer except as that Act expressly permits. (C.C. 1790.1.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Accrual of Cause of Action*.

Cross-References: 3 Cal. Proc. (5th), Actions, §§537, 538.



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aa. Nature and Purpose of Requirement.

4 *Witkin Sum. Cal. Law Sales* § 199

[§ 199] Nature and Purpose of Requirement.

A buyer who has accepted goods "must, within a reasonable time after he or she discovers or should have discovered any breach, notify the seller of breach or be barred from any remedy." (U.C.C. 2607(3)(A); see U.C.C. 1201(25)(c) [defining "discovers"]; C.E.B., 2 UCC Sales and Leases, §18.63 et seq.; 51 *Cal. L. Rev.* 586; 13 *Hastings L. J.* 84; 8 *U.C.L.A. L. Rev.* 332; 41 *A.L.R.2d* 812 [time for giving notice of breach of express warranty]; 89 *A.L.R.5th* 319 [sufficiency and timeliness of notice]; 67A *Am.Jur.2d* (2003 ed.), *Sales* §1109 et seq.)

The chief purpose of this provision was to ameliorate the harshness of the common law rule in some states that the mere acceptance by or passage of title to the buyer of the goods constituted a waiver of any and all remedies for breach of warranty, and at the same time to give the seller some protection against stale claims by requiring notice. (*Whitfield v. Jessup* (1948) 31 *C.2d* 826, 828, 193 *P.2d* 1; *Vogel v. Thrifty Drug Co.* (1954) 43 *C.2d* 184, 187, 272 *P.2d* 1; *Davidson v. Herring-Hall-Marvin Safe Co.* (1954) 131 *C.A.2d* Supp. 874, 876, 280 *P.2d* 549; *Metowski v. Traid Corp.* (1972) 28 *C.A.3d* 332, 339, 104 *C.R.* 599; cf. *Franck v. J.J. Sugarman-Rudolph Co.* (1952) 40 *C.2d* 81, 87, 251 *P.2d* 949 [same rule applied to breach of warranty in sale of corporate stock]; *Pollard v. Saxe & Yolles Dev. Co.* (1974) 12 *C.3d* 374, 380, 115 *C.R.* 648, 525 *P.2d* 88, 12 *Summary* (10th), *Real Property*, §463 [same rule applied to breach of warranty in sale of newly constructed building]; and see 24 *A.L.R.4th* 277 [necessity of notice of breach to manufacturer].)

The contention has been advanced that the only reason for the notice is to give the seller an opportunity to inspect the goods claimed to be defective, and that therefore no notice should be necessary where the defective goods consist of food sold and already consumed. This view has been generally rejected, and the requirement has been held applicable to sales of food, on the theory that the statute gives the seller the right to an early warning of the possibility of being subjected to a suit for damages. (*Whitfield v. Jessup*, *supra*, 31 *C.2d* 830; *Vogel v. Thrifty Drug Co.*, *supra*, 43 *C.2d* 187.)

The notice need not be in any particular form; it is sufficient if it "informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation." (U.C.C. 2607, Official

Comment 4.)

West's Key Number Digest, Sales k.400

SUPPLEMENT: [This section is current through the latest supplement]
U.C.C. 1201(25)(c), defining "discover," was renumbered U.C.C. 1202(c) in 2006.

See *Brittalia Ventures v. Stuke Nursery Co.* (2007) 153 C.A.4th 17, 24, 28, 62 C.R.3d 467 [in action by buyer of walnut trees against seller arising from trees' having developed crown gall disease, trial judge properly instructed jury that buyer had to prove that it took reasonable steps to notify seller within reasonable time that trees did not satisfy warranties of merchantability and fitness for particular purpose].



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bb. Notice to Antecedent Seller: Voucher To Defend.

4 Witkin Sum. Cal. Law Sales § 200

[§ 200] Notice to Antecedent Seller: Voucher To Defend.

In many sales, particularly consumer sales by a retail dealer, ultimate warranty liability rests on a prior seller. U.C.C. 2607(5)(A) codifies the practice of *voucher to defend*, and provides for notice by the "buyer" (usually the retailer) to that buyer's seller (usually the manufacturer). (See U.C.C. 2607, Official Comment 7; 51 Cal. L. Rev. 471; 18 Stanf. L. Rev. 666; 3 Cal. Proc. (4th), Actions, §209.)

The section permits the buyer to make a written demand on the seller to come in and defend whenever the buyer is sued for "breach of a warranty or other obligation for which his or her seller is answerable over." A seller who fails to act after "seasonable receipt" of the notice will be bound, in a subsequent action by the buyer against the seller, by any determination of fact common to the two actions: "If the notice states that the seller may defend and that if the seller does not do so he or she will be bound in any action against the seller by the buyer by any determination of fact common to the two litigation actions, then unless the seller after seasonable receipt of the notice does defend he or she is so bound." (U.C.C. 2607(5)(A).)

In *Bendix-Westinghouse Automotive Air Brake Co. v. Swan Rubber Co.* (1976) 55 C.A.3d 256, 127 C.R. 571, the court held that this requirement of information to the seller of the consequences of failure to defend is essential to a valid notice. Normally, a litigant is not bound by an adjudication in a prior proceeding in which he or she did not participate (55 C.A.3d 261); if the litigant is to be bound, as by application of U.C.C. 2607(5)(A), "due process demands that the literal requirement of such an exception be strictly obeyed" (55 C.A.3d 262).

The voucher to defend rule also applies to any obligation of a buyer to hold the seller harmless against claims for infringement or the like. (U.C.C. 2607(6); see *supra*, §68.) And, where such a claim arises, the original seller may demand control of the litigation. (See U.C.C. 2607(5)(B); C.E.B., 2 UCC Sales and Leases, §18.73.)

SUPPLEMENT: [This section is current through the latest supplement]
Cross-Reference: 3 Cal. Proc. (5th), Actions, §214.



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cc. Reasonable Time.

4 *Witkin Sum. Cal. Law Sales* § 201

[§ 201] Reasonable Time.

Under U.C.C. 2607(3)(A), as under former C.C. 1769, the buyer must give notice of the breach of warranty "within a reasonable time." The difficult question of what constitutes a "reasonable time" was presented in *Whitfield v. Jessup* (1948) 31 C.2d 826, 193 P.2d 1, on unusual facts. Plaintiff purchased raw cream from defendants, dairymen, from which she contracted undulant fever. She bought the cream in January, February, and March; she became ill in March; her doctor diagnosed the ailment as "flu" in May; it was finally identified as undulant fever on June 2; she was incapacitated during most of June, July, and August, but was able to get up during September. On November 20, her attorney gave defendants the notice. The trial court granted a nonsuit, and the dissenting justices thought this was proper on the ground that the notice was too late as a matter of law (over 5 months after the correct diagnosis). The majority opinion, however, held that the notice was not late as a matter of law, and reversed the judgment of nonsuit. (31 C.2d 831.)

Although the opinion stresses the latent defect in the milk, the peculiar nature of the disease, and the effect of plaintiff's illness on her ability to protect her rights, the case fails to suggest any test for determining the timeliness of the notice. (See 21 So. Cal. L. Rev. 184 [discussing superseded opinion of Court of Appeal]; *Franck v. J.J. Sugarman-Rudolph Co.* (1952) 40 C.2d 81, 87, 251 P.2d 949 [finding of unreasonable time and consequent waiver of right upheld]; *Davidson v. Herring-Hall-Marvin Safe Co.* (1954) 131 C.A.2d Supp. 874, 876, 280 P.2d 549 [defective safe, delay of 15 months held unreasonable; cases reviewed and dictum stated that 6 months would be unreasonable except in sale of foods with latent defects]; *Fieldstone Co. v. Briggs Plumbing Products* (1997) 54 C.A.4th 357, 371, 62 C.R.2d 701, 6 Summary (10th), *Torts*, §1515 [developer's notice that sinks were defective was not given within reasonable time, where developer knew of defect for 3 years before notifying two manufacturers, and notified third manufacturer 2 years later, at time of filing suit]; 13 *Hastings L. J.* 85.)

The Code distinguishes between commercial and consumer sales: "The time of notification is to be determined by applying commercial standards to a merchant buyer. 'A reasonable time' for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy." (U.C.C. 2607, Official Comment 4;

see 89 A.L.R.5th 319 [sufficiency and timeliness of notice].)

SUPPLEMENT: [This section is current through the latest supplement]



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dd. Exception: Consumer's Action Against Manufacturer.

4 *Witkin Sum. Cal. Law Sales* § 202

[§ 202] Exception: Consumer's Action Against Manufacturer.

In *Greenman v. Yuba Power Products* (1963) 59 C.2d 57, 27 C.R. 697, 377 P.2d 897, plaintiff, relying on the express warranty in a manufacturer's brochure, purchased a defective power tool from a retail seller, which broke and caused serious personal injuries. *Held*, the manufacturer was liable despite failure to give timely notice. (1) The warranty of the manufacturer arose independently of the contract of sale between the retail seller and plaintiff, and the statutory notice requirement was therefore inapplicable. (2) To adopt such a requirement by judicial decision would be undesirable, for the injured consumer seldom knows of the business practice which justifies it, and would not realize the necessity of giving notice to a person with whom he or she has had no dealings. (59 C.2d 61.) (See 51 Cal. L. Rev. 586.)

The *Greenman* case was followed in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Cavanaugh* (1963) 217 C.A.2d 492, 514, 32 C.R. 144, where the injury was to property. (See *supra*, §99.)

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SUPPLEMENT: [This section is current through the latest supplement]



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3. Measure of Damages.

aa. Statutory Rules.

4 *Witkin Sum. Cal. Law Sales* § 203

[§ 203] Statutory Rules.

(1) *Difference in Value*. The standard measure of damages for breach of warranty is the difference between "the value of the goods accepted and the value they would have had if they had been as warranted." (U.C.C. 2714(2), and see Official Comment 3; 4A Anderson 3d (1997 Rev. ed.), §2-714:121; 17 A.L.R.3d 1010, 1119; 91 A.L.R.3d 419 [elements and measure of damages for breach of warranty in sale of horse]; 94 A.L.R.3d 583 [measure of damages in action for breach of warranty of title]; 67A Am.Jur.2d (2003 ed.), Sales §1143.) Value is measured at the time and place of acceptance. (U.C.C. 2714(2); cf. Official Comment 3, suggesting that a later time would be appropriate if the buyer elected not to exercise a right to revoke acceptance; but see C.E.B., 2 UCC Sales and Leases, §18.25.)

(2) *Proximate Damages*. The standard measure does not apply where "special circumstances show proximate damages of a different amount." (U.C.C. 2714(2); on effect of buyer's knowing use of defective goods where proximate damages are asked, see U.C.C. 2715, Official Comment 5; 4A Anderson 3d (1997 Rev. ed.), §§2-714:91, 2-715:399; 33 A.L.R.2d 511.)

The Code standard of proximate damages where the difference in value measure does not compensate the buyer parallels similar remedies of the Sales Act. (See former C.C. 1789(6), (7); 61 Harv. L. Rev. 152.) A similar standard applicable to non-sales contracts by C.C. 3300 (see 1 Summary (10th), Contracts, §871) has occasionally been applied to sales contracts (see *Paul v. Williams* (1944) 64 C.A.2d 696, 702, 149 P.2d 284).

(3) *Incidental and Consequential Damages*. Incidental and consequential damages are recoverable. (U.C.C. 2714(3); see *infra*, §206.) The Commercial Code specifically authorizes consequential damages for "[i]njury to person or property proximately resulting from any breach of warranty." (U.C.C. 2715(2)(b), and see Official Comment 5; *De La Hoya v. Slim's Gun Shop* (1978) 80 C.A.3d Supp. 6, 10, 12, 146 C.R. 68, 1 Summary (10th), Contracts, §897 [recovery of litigation expenses made necessary by breach of warranty of title]; *Serian Bros. v. Agri-Sun Nursery* (1994) 25 C.A.4th 306, 309, 30 C.R.2d 382, *infra*, §204 [lost profits from diseased fruit trees were recoverable as consequential damages]; 6 *Pepperdine L. Rev.* 85 [suggesting that buyer's merchant status should affect seller's liability for extraordinary losses]; 67A Am.Jur.2d (2003 ed.), Sales §1153 et seq.; on effect of agreements limiting consequential

damages, see *infra*, §207.)

(4) *Damages Under Consumer Warranty Act.* The basic goal of the Consumer Warranty Act (C.C. 1790 et seq.) is to require one making express warranties with respect to consumer goods to provide service and repair facilities sufficient to make those goods as warranted. (See *infra*, §314 et seq.) When these facilities are not sufficient, the buyer or retailer is entitled to damages. A buyer injured by a wilful violation of the provisions of the Act may be awarded a civil penalty of up to double the amount of actual damages, as well as attorney fees, and a retail seller may receive an award of treble damages where the violation is wilful or repeated. (See *infra*, §§321, 324.)

West's Key Number Digest, Sales k.442(1)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Difference in Value.* See 4A Lawrence's Anderson 3d (2006 ed.), §2-714:88 et seq.

(2) *Proximate Damages.* See 4A Lawrence's Anderson 3d (2006 ed.), §2-714:92.



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3. Measure of Damages.

bb. Illustrations: Economic Loss.

4 Witkin Sum. Cal. Law Sales § 204

[§ 204] Illustrations: Economic Loss.

(1) *In General.* The buyer's right under the Sales Act to recover for loss "directly and naturally resulting in the ordinary course of business events from the breach of warranty" (former C.C. 1789(6)) was held to include lost profits, lost use of the goods, loss of customers and good will, and expenditures incurred in attempting to make defective goods conform to the condition warranted. (See *Grupe v. Glick* (1945) 26 C.2d 680, 690, 160 P.2d 832 [where buyer (dealer) intended to resell, buyer was entitled to recover (a) prospective profits, and (b) money spent in reasonable effort to make goods conform to warranty]; *Stott v. Johnston* (1951) 36 C.2d 864, 872, 229 P.2d 348 [loss of customers and goodwill]; *Tremeroli v. Austin Trailer Equipment Co.* (1951) 102 C.A.2d 464, 482, 227 P.2d 923 [defective equipment; prospective profits or loss of use]; *Roberts Distr. Co. v. Kaye-Halbert Corp.* (1954) 126 C.A.2d 664, 671, 272 P.2d 886 [money and time spent in reasonable efforts to make defective goods conform to warranty]; on concept of "proximate" damages under U.C.C. 2714(2), see *supra*, §203; on inapplicability of other theories of recovery where loss is economic only, see *Seely v. White Motor Co.* (1965) 63 C.2d 9, 45 C.R. 17, 403 P.2d 145, *infra*, this section; *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 C.A.4th 908, 923, 107 C.R.2d 761 [warranty, and not strict liability or negligence, provides remedy where defect does not cause property damage but only economic damage].)

(2) *Defective Motor Vehicle.* In *Seely v. White Motor Co.*, *supra*, plaintiff, in October 1959, bought a truck manufactured by White from S, retailer. It failed to work properly, and for 11 months S, guided by White's representatives, attempted unsuccessfully to correct the defect. In July 1960, the truck overturned and expensive damage resulted, which the trial judge found was not caused by the accident. In September 1960, plaintiff (having paid over \$ 11,000 on a price of over \$ 22,000), refused to make further payments. S repossessed and resold the truck for \$ 13,000. Plaintiff then sued White for damages (dismissing against S without prejudice). The trial judge found that White breached its warranty, and awarded \$ 11,659.44 for restitution of payments and \$ 9,240.40 for lost profits. *Held*, affirmed.

(a) The printed purchase order form which plaintiff signed contained an express warranty of freedom from defects. Plaintiff, by continued efforts to have the truck repaired, manifested the necessary reliance thereon; it was not necessary that he be aware that the warranty was made by the manufacturer rather than the dealer. (63 C.2d 13.)

(b) The warranty was expressly limited to making good at the factory any defective part. However, when, as here, "the warrantor repeatedly fails to correct the defect as promised, it is liable for the breach of that promise as a breach of warranty." (63 C.2d 14, citing *Rose v. Chrysler Motors Corp.* (1963) 212 C.A.2d 755, 28 C.R. 185, *infra*, §205.)

(c) The general principle of damages "directly and naturally resulting" (U.C.C. 2714) can properly include lost profits as well as the amount paid on the purchase price. The old Sales Act requirement of election between rescission and damages was not carried over into the Uniform Commercial Code and should not be applied to an action against a manufacturer for consequential damages. (63 C.2d 14.)

Although it was unnecessary to consider whether recovery would also be possible on the alternative theory of strict tort liability, the majority nevertheless undertook an elaborate examination of the two theories in the field of products liability, and concluded that strict tort liability does not constitute a proper basis of recovery for economic loss. (63 C.2d 15; see 6 *Summary* (10th), *Torts*, §1514.)

(3) *Defective Seeds or Seedlings.* Where seeds or seedlings do not conform to warranty, the normal measure of damages is the difference between the *value of the resulting crop* and the *value it would have had* if the warranty had not been breached. (See *Paul v. Williams* (1944) 64 C.A.2d 696, 703, 149 P.2d 284; *Hayman v. Shoemake* (1962) 203 C.A.2d 140, 158, 21 C.R. 519; *Posz v. Burchell* (1962) 209 C.A.2d 324, 341, 25 C.R. 896; *Shoemake v. F.H. Woodruff & Son* (1964) 227 C.A.2d 587, 590, 38 C.R. 817; *Klein v. Asgrow Seed Co.* (1966) 246 C.A.2d 87, 103, 54 C.R. 609.)

In *Serian Bros. v. Agri-Sun Nursery* (1994) 25 C.A.4th 306, 30 C.R.2d 382, plaintiff commercial grower sued defendant nursery for breach of contract, breach of implied warranties, negligence, and deceit, contending that peach trees plaintiff purchased from defendant were diseased when purchased. Plaintiff presented evidence of substantial damages from lost profits, but no evidence regarding the market value of the land on which the trees were planted. The trial judge, relying on *Posz v. Burchell*, *supra*, granted a nonsuit for defendant on all but the deceit cause of action, ruling that the only proper measure of damages was the decrease in the market value of the land as a result of the diseased trees. *Held*, reversed.

(a) *The Uniform Commercial Code allows recovery for lost profits.* Under U.C.C. 2714(1), damages resulting from a seller's breach of an implied warranty may be "determined in any manner which is reasonable." Computing the difference between the land's reasonable market value when planted with the diseased trees and its reasonable market value when planted with healthy trees is one way to measure damages, but not the only way. A buyer may present evidence of lost profits and other incidental and consequential damages. (25 C.A.4th 313, 314.)

(b) *Posz does not require a different conclusion.* To the extent that *Posz*, *supra*, held that the difference in land value is the only proper measure of damages when the seller of fruit trees breaches an implied warranty, it was incorrectly decided and construed earlier cases too restrictively. Furthermore, even if *Posz* had been correctly decided, it would have been superseded by the subsequent adoption of the *Uniform Commercial Code*. (25 C.A.4th 315.)

West's Key Number Digest, Sales k.442(2), 442(3)

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c. Breach of Warranty.

3. Measure of Damages.

cc. Illustrations: Personal Injury and Property Damage.

4 *Witkin Sum. Cal. Law Sales* § 205

[§ 205] Illustrations: Personal Injury and Property Damage.

When goods cause injury to persons or property because of the failure to conform to warranty, the recovery is frequently based on strict liability in tort. (See 6 *Summary* (10th), *Torts*, §1428 et seq.) But recovery on the theory of breach of warranty was allowed under the Sales Act and is expressly authorized by the Commercial Code (see U.C.C. 2715(2)(b)).

In *Rose v. Chrysler Motors Corp.* (1963) 212 C.A.2d 755, 28 C.R. 185, plaintiff purchased a new car with the standard warranty of the Automobile Manufacturers' Association adopted by all major manufacturers: The dealer warrants "each new motor vehicle" free from defects, the warranty limited to making good any defective parts without charge for labor or materials, within 90 days or 4,000 miles of use, whichever first occurs. The car developed defects in its wiring system which the dealer unsuccessfully attempted to correct; and, within the warranty period, the defect caused a fire with damages of \$ 2,028.59. In plaintiff's action against the dealer and manufacturer, defendants made the startling contention that their warranty covered only the particular defective parts as separate units; that plaintiff's damages were therefore limited to the value of the defective part of the wiring system; and that, in consequence of the destruction of the system and the virtual impossibility of furnishing any such proof, plaintiff was entitled to recover nothing. The court rejected this argument in the strongest terms, first observing that it would give a buyer only an "illusory" protection and would be "tantamount to a fraudulent defeat" of his natural understanding of the contract. (212 C.A.2d 759.) Supporting this general denunciation, the court invoked most of the statutory rules of construction; e.g., against absurdity (C.C. 1638), against repugnancy (C.C. 1652), and against the person causing uncertainty (C.C. 1654). But one ground of full liability was stressed: The "Explanation of Warranty" in the owner service certificate was completely inconsistent with the limited scope of warranty urged by defendants; and the dealer, in its several attempts to fix the car, never suggested any such limitation. Hence, the rule of construction of an ambiguous contract by acts and conduct of the parties was applicable. (212 C.A.2d 759, 761.)

The proper measure of damages was applied under former C.C. 1789(6), the loss directly and naturally resulting: here the destruction of the car by fire after numerous opportunities afforded the seller to find and correct the defective part that caused it. (212 C.A.2d 763.) (See also *Tremeroli v. Austin Trailer Equipment Co.* (1951) 102 C.A.2d 464, 480,

227 P.2d 923; 99 A.L.R.2d 1419 [construction and effect of standard new motor vehicle warranty]; but see *Seely v. White Motor Co.* (1965) 63 C.2d 9, 15, 16, 45 C.R. 17, 403 P.2d 145, supra, §204; 6 *Summary* (10th), *Torts*, §1513 et seq.)

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3. Damages.

d. Incidental and Consequential Damages.

1. General Rules.

4 Witkin Sum. Cal. Law Sales § 206

[§ 206] General Rules.

(1) *Incidental Damages*. The aggrieved buyer is entitled to incidental damages which "include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach." (U.C.C. 2715(1), and see Official Comment 1; C.E.B., 2 UCC Sales and Leases, §18.35; 96 A.L.R.3d 299.)

(2) *Consequential Damages*. These include "[a]ny loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise." (U.C.C. 2715(2)(a), and see Official Comment 2 et seq.; *Gerwin v. Southeastern Calif. Assn. of Seventh Day Adventists* (1971) 14 C.A.3d 209, 220, 92 C.R. 111 [traditional test of "reasonable foreseeability of probable consequences" remains applicable under Code]; *Camrosa County Water Dist. v. Southwest Welding & Mfg. Co.* (1975) 49 C.A.3d 951, 957, 123 C.R. 93, citing the text; see also 4A Anderson 3d (1997 Rev. ed.), §2-715:61 et seq.; C.E.B., 2 UCC Sales and Leases, §18.36; 6 *Pepperdine L. Rev.* 94; 96 A.L.R.3d 299; on consequential damages for breach of warranty, see *supra*, §203.)

(3) *Burden of Proof as to Mitigation*. In *Carnation Co. v. Olivet Egg Ranch* (1986) 189 C.A.3d 809, 229 C.R. 261, plaintiff chickenfeed producer sued defendant egg producer for defaulting on a note, and defendant cross-complained on the ground that the chickenfeed was substandard, resulting in a decrease in egg production. The trial judge granted a nonsuit in favor of plaintiff as to goodwill damages claimed by defendant because of its inability to service its egg marketing accounts. The basis for this ruling was that U.C.C. 2715(2)(a) places on the aggrieved party the burden of showing that it took reasonable steps to mitigate its consequential damages, and defendant failed to present evidence sufficient to meet that burden. *Held*, reversed.

(a) The burden of proving the extent of loss incurred by way of consequential damages rests with the injured party. (189 C.A.3d 818.) However, the Uniform Commercial Code fails to allocate the burden of proving mitigation. Although there are no pre-Code California goods cases dealing with the issue, other California contract cases, which adoption of the Code left undisturbed, place the burden of showing that consequential losses could have been avoided on the

breaching party. "Placing on the party who breaches the burden of showing that consequential losses could have been avoided is intuitively attractive, since proof that there has been a failure to mitigate adequately will reduce the damages awarded and, therefore, seems more in the nature of a defense." (189 C.A.3d 817.)

(b) It is more sensible to require the breaching party to prove those items which would reduce the aggrieved party's recovery; the aggrieved party would have little incentive to do so. The argument that it is preferable to place the burden of proving mitigation efforts on the party better able to adduce evidence of those efforts is not persuasive, since the breaching party has the ability to ascertain the pertinent facts. "A carefully drafted set of interrogatories could have provided Carnation with all the information it required about Olivet's efforts to mitigate its consequential damages. Since it therefore had access to the relevant evidence we see no reason why this consideration should prevent allocation to Carnation of the burden of showing that appellants failed to adequately mitigate their consequential damages." (189 C.A.3d 818.)

West's Key Number Digest, Sales k.418(19)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Consequential Damages*. See *Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 C.A.4th 937, 955, 56 C.R.3d 177, 5 Summary (10th), Torts, Supp., §118 [in action by buyer of oil seals against manufacturer, trial judge did not err in awarding buyer consequential damages on ground that complaints and demands experienced by buyer from its customers were reasonably foreseeable and probable result of manufacturer's breach of warranty of merchantability in supplying seals that were abrasive]; 4A Lawrence's Anderson 3d (2006 ed.), §2-715:63 et seq.



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d. Incidental and Consequential Damages.

2. Agreement Limiting Consequential Damages.

4 Witkin Sum. Cal. Law Sales § 207

[§ 207] Agreement Limiting Consequential Damages.

A party's right to consequential damages may be limited or excluded by any provision that is not unconscionable. (U.C.C. 2719(3), and see Official Comment 3; 2A Anderson 3d (1997 Rev. ed.), §2-302:278 et seq.; 20 *Loyola L.A. L. Rev.* 181; 66 *So. Cal. L. Rev.* 1273 [conflict between U.C.C. 2719(3) and U.C.C. 2719(2), invalidating remedy that "fails of its essential purpose"]; 38 *A.L.R.4th* 25.) (On unconscionable terms in contracts, see C.C. 1670.5, 1 *Summary* (10th), *Contracts*, §330 et seq.)

Where commercial losses are involved, the burden is on the buyer to prove that the limitation is unconscionable. But where the damages arise from personal injuries in a sale of consumer goods, the seller must prove that the limitation is not unconscionable. (U.C.C. 2719(3); see C.E.B., 2 UCC Sales and Leases, §18.54.) And the alternative strict liability theory of recovery in personal injury cases is not influenced by any contractual limitations. (*Vandermark v. Ford Motor Co.* (1964) 61 *C.2d* 256, 263, 37 *C.R.* 896, 391 *P.2d* 168, 6 *Summary* (10th), *Torts*, §1495.)

In *Nunes Turfgrass v. Vaughan-Jacklin Seed Co.* (1988) 200 *C.A.3d* 1518, 246 *C.R.* 823, plaintiff sodgrower sued defendant seed company for breach of warranty and product liability in connection with the purchase from defendant of grass seed that turned out to be contaminated. The sales contract contained a provision purporting to limit defendant's liability to a refund of the purchase price of the seed, and to exclude liability for incidental or consequential damages. *Held*, the limitation of liability was not unconscionable. U.C.C. 2719(3) provides that a party's right to consequential damages may be limited or excluded by any provision that is not unconscionable. Here, the parties were both large companies that had been dealing with each other for 20 years. Plaintiff was familiar with the damage limitation, and had similar restrictions on its products. Defendant would not have sold the seed at the reduced price agreed upon without the limitation. (200 *C.A.3d* 1539.)

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SUPPLEMENT: [This section is current through the latest supplement]
See 2A Anderson 3d (2008 Rev. ed.), §2-302:271 et seq.



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3. Damages.

e. Deduction of Damages From Price.

4 Witkin Sum. Cal. Law Sales § 208

[§ 208] Deduction of Damages From Price.

A buyer who has a right to damages under the Code may deduct them "from any part of the price still due under the same contract." (U.C.C. 2717.) The buyer must give notice of an intention to exercise this right in order to prevent a condition of insecurity arising under U.C.C. 2609 (see *supra*, §170). (U.C.C. 2717, and see Official Comment 2; on form of notice, see C.E.B., 2 UCC Sales and Leases, §17.82.)

Under the Sales Act, the buyer could only offset damages arising from breach of warranty. (Former C.C. 1789(1)(a); *United States Machine Co. v. International Metals Dev. (1946)* 74 C.A.2d 5, 168 P.2d 37; see U.C.C. 2717, Official Comment 1.)

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C. Remedies of Buyer.

4. Specific Performance or Replevin.

4 Witkin Sum. Cal. Law Sales § 209

[§ 209] Specific Performance or Replevin.

(1) *Specific Performance*. Former C.C. 1788 permitted the courts to grant an aggrieved buyer specific performance of a contract to deliver "specific or ascertained goods." (See *Anderson v. Permenter* (1947) 78 C.A.2d 378, 381, 382, 177 P.2d 818 [denied where contract too uncertain]; *Price v. McConnell* (1960) 184 C.A.2d 660, 666, 7 C.R. 695, citing the text [purchase of breeding heifers; specific performance of part calling for registration papers]; 9 Cal. L. Rev. 33; 64 Harv. L. Rev. 512; 13 Summary (10th), *Equity*, §30.)

U.C.C. 2716 is intended to broaden the discretionary remedy "to give the buyer rights to the goods comparable to the seller's rights to the price." (Official Comment 4; see 67A Am.Jur.2d (2003 ed.), *Sales* §1046.) It permits the courts to decree specific performance "where the goods are unique or in other proper circumstances" and to include in the decree "such terms and conditions as to payment of the price, damages, or other relief as the court may deem just." (U.C.C. 2716(1), (2), and see Official Comment 2; C.E.B., 2 UCC Sales and Leases, §18.47; 26 A.L.R.4th 294.)

(2) *Specific Recovery*. The Code extends to a buyer the right of "replevin" for identified goods in certain situations where cover (see supra, §194) after nondelivery is not feasible, or where the goods have been shipped under reservation (see supra, §145) and satisfaction of the security interest in them has been made or tendered. In the case of goods bought for personal, family, or household purposes, the buyer's right of replevin vests upon acquisition of a special property (see supra, §141), even if the seller has not, at that time, repudiated or failed to deliver. (U.C.C. 2716(3), and see Official Comments 3, 5; C.E.B., 2 UCC Sales and Leases, §18.46; 67A Am.Jur.2d (2003 ed.), *Sales* §1053; 5 Cal. Proc. (4th), *Pleading*, §651 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Specific Recovery*.

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §692 et seq. *Correction:* Page 189, line 3 of section, "*Permenter*" should be "*Perminter*".



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D. Proof of Market Price.

4 Witkin Sum. Cal. Law Sales § 210

[§ 210] Proof of Market Price.

Several general rules are provided by the Code for determining market price in an action by a seller for nonacceptance (see *supra*, §188) or an action by a buyer for nondelivery (see *supra*, §195). (See generally *67A Am.Jur.2d (2003 ed.)*, *Sales §819 et seq.*; *1 Cal. Evidence (4th)*, *Circumstantial Evidence*, §114 *et seq.*)

(1) *When evidence is not readily available* as to the market price at the times and places required by U.C.C. 2708 or 2713, "the price prevailing within any reasonable time before or after the time described or at any other place which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the cost of transporting the goods to or from such other place." (U.C.C. 2723(2); see C.E.B., 2 UCC Sales and Leases, §18.61.)

(2) *Evidence of market quotations is admissible* where the goods are regularly subject to sale in an established commodity market. Such quotations may be in the form of official publications, trade journals, or general circulation magazines and newspapers. "The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility." (U.C.C. 2724, and see Official Comment; and see also *1 Cal. Evidence (4th)*, *Hearsay*, §294.)

(3) Circumstances may justify *other reasonable methods of determining market price*; the rules provided by the Code are not intended to be exclusive. (See U.C.C. 2723, Official Comment.)

(4) Evidence of a relevant price prevailing at a time or place other than the one described in the Code is inadmissible unless the party offering it gives "the other party such notice as the court finds sufficient to prevent unfair surprise." (U.C.C. 2723(3).)

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E. Contractual Modification of Remedies.

4 Witkin Sum. Cal. Law Sales § 211

[§ 211] Contractual Modification of Remedies.

The Commercial Code gives parties a limited freedom to modify the remedies available: A contractual modification must be *reasonable* and must provide an aggrieved party "at least minimum adequate remedies." (U.C.C. 2719, Official Comment 1; see C.E.B., 2 UCC Sales and Leases, §18.53 et seq.; 67A *Am.Jur.2d* (2003 ed.), *Sales* §836 et seq.; for restrictions on consequential damages, see *supra*, §206; for restrictions on a defaulting buyer's right to restitution, see *supra*, §183; on liquidated damages, see *infra*, §212.)

The Code creates a presumption in favor of cumulation rather than restriction of remedies. (See U.C.C. 2719, Official Comment 2.) Accordingly, a contractual provision that gives one party a particular remedy is deemed to create an optional rather than a sole remedy, unless the one created "is expressly agreed to be exclusive." (U.C.C. 2719(1)(b); see 4B Anderson 3d (2001 Rev. ed.), §2-719:51 et seq.)

Even though a contractual modification of remedies may have been reasonable in its inception, it may be set aside and the standard Code remedies applied where circumstances cause the stipulated remedy "to fail of its essential purpose." (U.C.C. 2719(2), and see Official Comment 1; see also 4B Anderson 3d (2001 Rev. ed.), §2-719:125 et seq.; 65 *Cal. L. Rev.* 28; 20 *Loyola L.A. L. Rev.* 181; cf. *Rose v. Chrysler Motors Corp.* (1963) 212 *C.A.2d* 755, 759, 761, 28 *C.R.* 185, *supra*, §205 [pre-Code case; refusal to apply a contractual remedy limited to replacement of part where defective part caused extensive damage].)

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F. Liquidated Damages.

4 Witkin Sum. Cal. Law Sales § 212

[§ 212] Liquidated Damages.

A contract for sale may provide for liquidated damages "subject to and in compliance with" C.C. 1671. In the event of failure to comply with that section, "remedy may be had as provided" in Division 2. (U.C.C. 2718(1); on C.C. 1671, see 1 *Summary* (10th), *Contracts*, §533 et seq.; see also C.E.B., 2 UCC Sales and Leases, §§17.23, 18.51.) This is a departure from the Official Text, which permits liquidated damages that are "reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy." (1C U.L.A. (Master Ed.), §2-718(1); see 98 *A.L.R.3d* 586 [liquidated damages provisions under Unif.Com.C., Art. 2]; 67A *Am.Jur.2d* (2003 ed.), *Sales* §823 et seq.)

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G. Statute of Limitations.

4 *Witkin Sum. Cal. Law Sales* § 213

[§ 213] Statute of Limitations.

The Code establishes a 4-year statute of limitations in actions for breach of a contract for sale. (U.C.C. 2725(1); see *20 Pepperdine L. Rev.* 1407 [action for indemnity as means of avoiding 4-year statute of limitations under U.C.C. 2725]; *49 A.L.R.5th* 1 [which causes of action are governed by U.C.C. 2725]; 3 *Cal. Proc. (4th), Actions*, §485; see also U.C.C. 2725(3) [time for bringing second action after voluntary termination of first action for same breach]; on accrual of the cause of action, see U.C.C. 2725(2); 3 *Cal. Proc. (4th), Actions*, §486 et seq.)

The limitation may be reduced by the original agreement to not less than 1 year, but cannot be extended beyond the statutory period. (U.C.C. 2725(1); see 3 *Cal. Proc. (4th), Actions*, §§436, 437.) Accordingly, since the effect of a contractual waiver of the statutory 4-year period is to extend it, such a waiver is invalid. (*Mysel v. Gross* (1977) 70 C.A.3d Supp. 10, 15, 138 C.R. 873, citing *Cal. Procedure*.) And the general law on tolling of limitation statutes is applicable to causes of action arising under the Code. (U.C.C. 2725(4); see 3 *Cal. Proc. (4th), Actions*, §633 et seq.)

In *H. Russell Taylor's Fire Prevention Service v. Coca Cola Bottling Corp.* (1979) 99 C.A.3d 711, 160 C.R. 411, plaintiff orally agreed to supply fire extinguishers to be used by defendant for a specified period, and defendant failed to return some of them at the end of the period. Plaintiff waived the tort of conversion and sued on the theory of implied in law contract for purchase and sale of goods (see 1 *Summary* (10th), *Contracts*, §1040). The 3-year statute of limitations on conversion (*C.C.P.* 338(c); 3 *Cal. Proc. (4th), Actions*, §567) had run; but if the 4-year period of U.C.C. 2725(1) applied, the action was timely. *Held*, the action was not barred. Construing U.C.C. 2106 (defining contract for sale) and U.C.C. 1201(3) (defining agreement), and taking into consideration the business policies involved, U.C.C. 2725(1) may properly be applied to the contract implied in law on a waiver of tort. (99 C.A.3d 723, 724.)

In *Massey-Ferguson Credit Corp. v. Casaulong* (1976) 62 C.A.3d 1024, 133 C.R. 497, defendant, a conditional buyer of farm machinery, defaulted. Plaintiff conditional seller repossessed and resold for less than the balance due, and brought this action for the deficiency. Defendant contended that the statute of limitations commenced to run on breach and repossession, more than 4 years before the action was brought. Plaintiff argued that it did not begin to run until the later time of resale, when the right to a deficiency accrued. *Held*, judgment for defendant on demurrer affirmed.

(a) Plaintiff argued that U.C.C. 2725, dealing with sales, is inapplicable to secured transactions (see U.C.C. 2102, *supra*, §31). But, as held in a New Jersey case, the action to recover a deficiency judgment is more closely related to the sales aspect of this sales-security agreement, and U.C.C. 2725 governs. (62 C.A.3d 1027, 1028.)

(b) The rule on actions for a deficiency arising from resale of real property secured by a deed of trust is persuasive: The cases hold that the action is "founded" on the instrument, even though the amount of the deficiency is not ascertainable until the security has been exhausted. "By parity of reasoning, an action to recover a deficiency arising from resale of goods originally purchased under conditional sale contract is based upon the contract of sale. We conclude therefore, by analogy to the real property cases, that a conditional seller's action to recover a deficiency from a defaulting buyer is barred by California *Commercial Code* section 2725 if more than four years have elapsed since the breach of the conditional sale agreement." (62 C.A.3d 1029.)

West's Key Number Digest, Sales k.374

SUPPLEMENT: [This section is current through the latest supplement]

Actions for breach of contract for sale:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §519.

Accrual of cause of action:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §520 et seq.

Reduction by agreement:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §468 et seq.

General law on tolling:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §695 et seq.

Statute of limitations on conversion:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §619.



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A. In General.

4 Witkin Sum. Cal. Law Sales § 214

[§ 214] In General.

A transfer of property that comes within the test of a fraudulent transfer, i.e., one made with actual intent to defraud creditors, or, in certain circumstances, by an insolvent person, is void against creditors and their successors in interest. (See C.C. 3439 et seq., 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §460 et seq.) Other types of transfers are made fraudulent by statute, regardless of actual intent or insolvency. These include transfers without change of possession (infra, §215 et seq.) and transfers of certain inventory or fixtures "in bulk" (infra, §219 et seq.).

Where the seller is not the true owner of the goods, and sells without authority or consent of the owner, the buyer normally acquires no better title to the goods than the seller had. (U.C.C. 2403(1).) But the rule must be considered in light of the following:

(1) Sales by factors, who have statutory authority to sell goods as their own (see C.C. 2026; 3 *Summary* (10th), *Agency and Employment*, §44).

(2) Filing statutes (see 4 *Summary* (10th), *Secured Transactions in Personal Property*, §76).

(3) Common law or statutory powers of sale, e.g., a power of sale under U.C.C. 9610 (see 4 *Summary* (10th), *Secured Transactions in Personal Property*, §179 et seq.).

(4) Sales under order of court (see 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §§147, 155).

(5) Any enactment enabling the apparent owner of goods to dispose of them as if he or she were the true owner thereof (see infra, §229).

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SUPPLEMENT: [This section is current through the latest supplement]

Transfer with intent to defraud:

Cross-Reference: 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §488 et seq.(4) *Sales under order of court:*

Cross-Reference: 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §§156, 164.



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B. Transfer Without Change of Possession.
1. Requirement of Immediate Change of Possession.

4 Witkin Sum. Cal. Law Sales § 215

[§ 215] Requirement of Immediate Change of Possession.

(1) *In General.* With certain exceptions (infra, §216), transfers of personal property (including sales and pledges) are void as against (a) creditors of the transferor (secured or unsecured) at the time of the transfer and those who become creditors while the transferor remains in possession, and (b) their successors and purchasers in good faith subsequent to the transfer, unless "accompanied by an immediate delivery followed by an actual and continued change of possession" of the property. (C.C. 3440(a); see 17 *Pacific L. J.* 642.)

C.C. 3440 applies regardless of whether the transfer is subject to the Commercial Code. However, when the seller is a merchant, the Code excepts a "retention of possession in good faith and current course of trade" for a commercially reasonable time. (U.C.C. 2402(2); see C.C. 3440.9 [U.C.C. 2402(2) is not restricted by C.C. 3440 et seq.]; *Gardner v. Sullivan & Crowe Equipment Co.* (1971) 17 C.A.3d 592, 596, 94 C.R. 893; 67 Am.Jur.2d (2003 ed.), Sales §430.)

C.C. 3440 was said to apply to a transfer of community property from a husband to a wife where the goods were permitted to remain in the same place. (*Pfunder v. Goodwin* (1927) 83 C.A. 551, 554, 257 P. 119.) And "the fact that the transferor and transferee were employee and employer furnishes no reason why the statute should receive a more liberal construction than in cases of such transfers between strangers." (*Southern Calif. Collection Co. of Los Angeles v. Napkie* (1951) 106 C.A.2d 565, 570, 235 P.2d 434; see also *Aggregates Associated v. Packwood* (1962) 58 C.2d 580, 590, 25 C.R. 545, 375 P.2d 425 [sale of buildings to be demolished]; *Raddatz v. Hedgpeth* (1963) 223 C.A.2d 633, 637, 35 C.R. 855 [transfer of sawmill equipment]; *Monastra v. Konica Business Machines, U.S.A.* (1996) 43 C.A.4th 1628, 1636, 1637, 51 C.R.2d 528, infra, §228 [compliance with bulk sales laws does not immunize transfer from challenge under C.C. 3440].)

(2) *Vehicles.* Provisions of the Vehicle Code establishing formalities for passage of title to an automobile do not repeal by implication the provisions of C.C. 3440. Thus, retention of possession by the seller of an automobile is subject to the rule. (*Washington Lumber & Millwork Co. v. McGuire* (1931) 213 C. 13, 16, 1 P.2d 437; see *Dot Records v. Freeman* (1966) 247 C.A.2d 204, 208, 55 C.R. 455, infra, §218; 28 Cal. L. Rev. 64, 73.)

(3) *Rights Unaffected.* C.C. 3440 does not affect the rights of (a) a buyer for value in good faith who purchases the transferred property from the transferee or the transferee's successor in interest, provided the transferor is not in possession of the property at the time of the buyer's purchase (C.C. 3440.4); or (b) a secured party who, for value and in

good faith, acquires a security interest from the transferee or the transferee's successor in interest, if the transferor is not in possession when the security interest attaches (C.C. 3440.5(a)), or, except as provided in C.C. 3440.3 (infra, §216), if the intended debtor or secured party files a financing statement on or before the date the security agreement is executed (C.C. 3440.5(b)(1)), and publishes notice of the transfer (C.C. 3440.5(b)(2)).

(4) *Limitation of Actions.* C.C. 3440.6 provides that no action may be brought or levy made under C.C. 3440 et seq. more than 1 year after the earliest of the following dates:

- (a) The date the person bringing suit or making the levy should have discovered the transfer.
- (b) The date the person bringing suit or making the levy obtained actual knowledge of the transfer.
- (c) The date the delivery of, and change of possession of, the property transferred occurred.

(d) If the financing statement filed pursuant to C.C. 3440.1(h) (see infra, §216) has not lapsed, the date the filing and publication requirements of C.C. 3440.1(h) were met (other than the requirement that the filing of the financing statement and publication of the notice referred to therein be completed prior to the transfer).

SUPPLEMENT: [This section is current through the latest supplement]



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2. Exceptions.

4 Witkin Sum. Cal. Law Sales § 216

[§ 216] Exceptions.

C.C. 3440.1 expressly excepts certain transactions from the requirement of change of possession, and other exceptions have been developed by the case law:

- (1) *Things in action.* (C.C. 3440.1(a); see *Burkett v. Doty* (1917) 176 C. 89, 92, 167 P. 518.)
- (2) *Ships or cargoes at sea or in a foreign port.* (C.C. 3440.1(b).)
- (3) *Security interests and the sale of accounts, chattel paper, payment intangibles, or promissory notes governed by the Commercial Code.* (C.C. 3440.1(c).)
- (4) *Contracts of bottomry and respondentia.* (C.C. 3440.1(c).)
- (5) *Wines or brandies in a winery, distillery, or wine cellar.* This exception is subject to the proviso that the transfer be made by an executed and acknowledged writing that is recorded in the county in which the property is situated. (C.C. 3440.1(d).)
- (6) *Transfers or assignments made for the benefit of creditors generally.* (C.C. 3440.1(e).)
- (7) *Property exempt from enforcement of a money judgment.* (C.C. 3440.1(f); see *Williamson v. Monroe* (1917) 174 C. 462, 465, 163 P. 662 [former execution law].)
- (8) *Standing timber.* (C.C. 3440.1(g).)
- (9) *Transfers where transferor or transferee files financing statement and publishes notice.* (C.C. 3440.1(h); see C.C. 3440.3 [transfer is nonetheless void as against buyer in ordinary course of business from transferor]; 17 *Pacific L. J.* 642.)
- (10) *Transfers where claim of creditor of, or buyer from, transferor arose after requirements of C.C. 3440.1(h) were met.* (C.C. 3440.2 [other than requirement that filing of financing statement and publication of notice referred to therein be completed prior to transfer]; subject to C.C. 3440.3, *supra*.)

(11) *Personal property not located within state at time of transfer or attachment of lien.* (C.C. 3440.1(i) [provided that provisions of subdivision are not used to evade C.C. 3440 et seq.].)

(12) *Transfers subject to statute or treaty providing for registration of transfers or issuance of certificate of title.* (C.C. 3440.1(j) [where transfer is so far perfected that bona fide purchaser cannot acquire interest superior to transferee].)

(13) *Transfers of personal property in connection with transactions where property is immediately leased by transferor from transferee.* (C.C. 3440.1(k), adding the proviso that the transferee had purchased property for value and in good faith.)

(14) *Transition property as defined in Pub.Util.C. 840 (restructuring of electrical industry), and recovery property as defined in Pub.Util.C. 848.* (C.C. 3440.1(l).)

(15) *Property not in possession of seller.* This exception applies where the seller does not have possession at the time of the sale, provided that the buyer later acquires possession. (*Williams v. Borgwardt* (1897) 119 C. 80, 51 P. 15; *Cosby v. Cline* (1921) 186 C. 698, 701, 702, 200 P. 801 [property in hands of sheriff at time of sale]; *Behlen v. Mackie* (1952) 113 C.A.2d 132, 134, 247 P.2d 847.)

(16) *Growing crops.* These are not susceptible of manual delivery until harvested; but change of possession must take place immediately upon harvesting. (*Rosenberg Bros. & Co. v. Ross* (1907) 6 C.A. 755, 759, 760, 93 P. 284; *Westcott v. Nixon* (1933) 132 C.A. 490, 495, 23 P.2d 75; *Cannon v. Chapman* (1938) 24 C.A.2d 448, 450, 75 P.2d 522.)

(17) *Special circumstances making change of possession unreasonable.* Where a conditional sale contract covering a truck provided that any parts added should belong to the seller, title to a new body built by the buyer passed to the seller by accession; transfer of possession was rejected as an unreasonable requirement. (*Dersch v. Thomas* (1934) 138 C.A. Supp. 785, 790, 30 P.2d 630.)

SUPPLEMENT: [This section is current through the latest supplement]

(14a) *(New) Transfers of property by governmental entities.* (C.C. 3440.1(m), added in 2005.)



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- 3. What Constitutes Sufficient Change of Possession.
- a. Test and Illustrations.

4 Witkin Sum. Cal. Law Sales § 217

[§ 217] Test and Illustrations.

The sufficiency of a change of possession is a question of fact, depending somewhat on the character of the property. But it must be *actual* and open, so as to give notice of the change of ownership. (See *Sequeira v. Collins* (1908) 153 C. 426, 429, 95 P. 876; *McCaffey Canning Co. v. Bank of America* (1930) 109 C.A. 415, 435, 294 P. 45; *Hepner v. Hepner* (1939) 32 C.A.2d 582, 584, 90 P.2d 321; *O'Connor v. O'Connor, Rice & Barnes* (1941) 44 C.A.2d 1, 5, 111 P.2d 656; *Southern Calif. Collection Co. of Los Angeles v. Napkie* (1951) 106 C.A.2d 565, 570, 235 P.2d 434; 19 Cal. L. Rev. 333.) If the goods are located some distance from the buyer, a reasonable time will be allowed to secure them. (*Feeley v. Boyd* (1904) 143 C. 282, 285, 76 P. 1029.)

In *Credit Bureau of San Diego v. Wolf* (1949) 93 C.A.2d 761, 764, 209 P.2d 828, it was held that there was a sufficient change of possession where the legal owner, a finance company, repossessed the car from W, the registered owner, and then entered into a new contract of sale with C, despite the fact that C allowed W to use the car on several occasions thereafter.

If the goods are bulky, or require further acts to make them suitable for use, it is not essential that they be removed from the land of the seller. Thus, in *Rosenthal v. Taylor* (1927) 87 C.A. 399, 262 P. 395, the buyer purchased two dismantled pumps, then lying in the seller's yard. He assembled and moved them to a shed belonging to the seller, stored them there, and took a few of the parts away with him. *Held*, this was sufficient change of possession. (87 C.A. 401.)

West's Key Number Digest, Sales k.201(5)

SUPPLEMENT: [This section is current through the latest supplement]



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- B. Transfer Without Change of Possession.
- 3. What Constitutes Sufficient Change of Possession.
 - b. Insufficient Change.

4 Witkin Sum. Cal. Law Sales § 218

[§ 218] Insufficient Change.

Purely *formal acts*, of whatever dignity, not amounting to actual physical change of possession, are insufficient. Thus, *recordation* of a written instrument, such as a bill of sale, does not excuse lack of compliance with C.C. 3440. (*Pfunder v. Goodwin* (1927) 83 C.A. 551, 554, 257 P. 119; *Edgerton v. Scammon* (1931) 119 C.A. 273, 276, 6 P.2d 295; *Crofts & Anderson v. H.L. Petersen Const. Co.* (1955) 130 C.A.2d 790, 792, 279 P.2d 828; on exception where financing statement is filed and notice is published, see *supra*, §216.) Purported transfer of possession by changing *signs* or *labels* on goods, without moving them, will ordinarily not be sufficient. (*O'Connor v. O'Connor, Rice & Barnes* (1941) 44 C.A.2d 1, 5, 111 P.2d 656; see also *McCaffey Canning Co. v. Bank of America* (1930) 109 C.A. 415, 435, 294 P. 45.) And a purported "symbolic delivery," by handing over keys to a car, which were immediately handed back, was obviously insufficient. (*Southern Calif. Collection Co. of Los Angeles v. Napkie* (1951) 106 C.A.2d 565, 571, 235 P.2d 434.)

Similarly, attempts to comply with the statute by having the seller or the seller's employees stay in possession as *agents* or *employees* of the buyer are likewise ineffective, since these fail to give adequate notification to the creditors of the seller. (*O'Connor v. O'Connor, Rice & Barnes, supra*.) Thus, in *Dot Records v. Freeman* (1966) 247 C.A.2d 204, 55 C.R. 455, defendant Dorothy, operating a business, brought her sister Maxine into her home to be her housekeeper and take care of her small child. Maxine, in performance of her duties, drove Dorothy's Cadillac. Later Dorothy, who had three other cars at her disposal, registered title to the Cadillac in the names of Maxine and her husband. There was consideration for the transfer and it was good between the parties. But Dorothy continued to drive it at times, just as she did before the transfer; hence, it was subject to attachment by her creditor. (247 C.A.2d 207, 208.)

C.C. 3440 was applied with great strictness, on extremely doubtful facts, in *Wargin v. Wargin* (1947) 29 C.2d 843, 180 P.2d 349. Plaintiff, a divorced woman with a child support decree, levied execution on a car supposedly owned by defendant, her former husband. The evidence was that the husband sold the car to his second wife's mother by a bill of sale in partial satisfaction of a loan, but failed to complete registration under the Vehicle Code. *Held*, the trial court properly concluded that possession had not been transferred, on inferences from the following facts: (1) the mother (buyer) could not drive; her daughter (the seller's second wife) drove her around and had a set of keys; (2) "no change was made in the storage ... except that receipts for garage rent were issued" in the name of the mother. (29 C.2d 846.)

Although the foregoing decision might perhaps be justified on other grounds, the holding as to C.C. 3440 seems unsound. (1) The fact that the seller's wife acted as driver for her mother, the buyer, can hardly be deemed significant. (2) The obscure statement with respect to the place of storage indicates that the car was kept in some public garage, and the garageman's recognition of the new ownership by change in the name on the rent receipts would appear to be strong evidence of change of possession.

West's Key Number Digest, Sales k.201(5)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Bulk Sales.
1. In General.

4 *Witkin Sum. Cal. Law Sales* § 219

[§ 219] In General.

(1) *Nature of Statutes.* Bulk sales laws are mainly directed against two kinds of fraudulent merchants: (a) one who sells his or her stock in trade to a friendly buyer for less than its worth, pays creditors less than they are owed, and contemplates reestablishing the business; and (b) one who sells to any buyer and leaves without paying his or her creditors. (See generally 42 *Cal. L. Rev.* 581; 65 *Harv. L. Rev.* 418; 47 *A.L.R.3d* 1114.) In addition to the provisions of the Uniform Commercial Code and its state counterparts, bulk sales regulations are also found in some tax statutes, e.g., Rev.C. 6811, 6812 (9 *Summary* (10th), *Taxation*, §371); *Unemp.Ins.C.* 1731. (See *Schnyder v. State Bd. of Equalization* (2002) 101 *C.A.4th* 538, 548, 124 *C.R.2d* 571 [purchasers of grocery business in bulk sale could not avoid personal liability for sales or use taxes owed by former owner by relying on interpleader scheme of U.C.C. 6106.2, 6106.4 (*infra*, §226) to resolve conflicting claims; successor liability provisions of Rev.C. 6811, 6812 prevail over bulk sales provisions].)

(2) *Approval of Revised Article 6.* A revised Article 6 of the Uniform Commercial Code was approved by the National Conference of Commissioners on Uniform State Laws in 1989, and was subsequently approved by the American Law Institute. The chief reasons for the revision were: (a) the duties imposed upon transferees in bulk toward creditors of the transferor, including the duty to notify creditors of an impending bulk transfer, could be burdensome, particularly when the number of creditors involved is large; (b) noncompliance with former Article 6 rendered a transfer ineffective, regardless of a transferor's good faith or the absence of injury to any creditor; (c) the benefits to creditors resulting from compliance were often minimal, and in some cases Article 6 injured creditors by discouraging the purchase of a transferor's goods at market value. (See Official Comment to Unif.Com.C. §6-101, 2C U.L.A. (Master Ed.), pp. 10, 11.)

(3) *California Modifications.* In 1990 the Legislature repealed former Division 6 of the Commercial Code, "Bulk Transfers," and enacted a new Division 6, entitled "Bulk Sales." The new Division applies to bulk sales on or after January 1, 1991. (U.C.C. 6111(a).) If the date of a bulk sale is on or after January 1, 1991, but the date of the bulk sale *agreement* is before that date, various transitional rules apply. (U.C.C. 6111(b).)

As was the case when California adopted former Division 6 but retained many features of prior law, the revised bulk sales division of the Commercial Code was extensively modified in California to retain many features of former Division 6. (See U.C.C. 6101 et seq.; cf. 2C U.L.A. (Master Ed.), Unif.Com.C. §6-101 et seq.; and see C.E.B., 1 UCC

Sales and Leases, §14.1; Cal. Civil Practice, 4 Business Litigation, §47:1 et seq.; for discussion of provisions of Division 6, see *infra*, §220 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Approval of Revised Article 6*. See Official Comment to Unif.Com.C. §6-101, 2C U.L.A. (Master Ed.), pp. 14-16.



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C. Bulk Sales.
2. Businesses Covered.

4 *Witkin Sum. Cal. Law Sales* § 220

[§ 220] Businesses Covered.

(1) *Former Law.* Division 6 of the Commercial Code formerly covered enterprises whose principal business was "that of a baker, cafe or restaurant owner, garage owner, cleaner and dyer, or retail or wholesale merchant." (Former U.C.C. 6102(3); cf. *Sampson v. Boysen* (1935) 9 C.A.2d 413, 418, 50 P.2d 95 [predecessor statute applied to sale of interest in business where purpose was to bring buyer into partnership].)

The creation of a security interest was formerly within the scope of Division 6. (Former U.C.C. 6102(5); see 21 *Cal. L. Rev.* 59.) In 1978, U.C.C. 6102(5) was amended to exclude the creation or modification of security interests. (See 10 *Pacific L. J.* 287, 290.)

(2) *Revised Division 6.* U.C.C. 6103(a)(1) covers sellers whose "principal business is the sale of inventory from stock, including those who manufacture what they sell, or that of a restaurant owner." (Cf. 2C U.L.A. (Master Ed.), Unif.Com.C. §6-103(1) [applying division to sellers whose principal business is sale of inventory from stock].) In addition, the seller must be located in California on the date of the bulk sale agreement or, in the case of a seller located outside the United States, must have its major executive office in the United States located in California. (See C.E.B., 1 UCC Sales and Leases, §14.1.)

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3. Transfers Covered.

4 Witkin Sum. Cal. Law Sales § 221

[§ 221] Transfers Covered.

U.C.C. 6102(a)(3) defines a "bulk sale" as either: (1) in the case of a sale by auction (see U.C.C. 6108) or a sale or series of sales conducted by a liquidator on the seller's behalf, a sale or series of sales not in the ordinary course of the seller's business *of more than half* of the seller's *inventory and equipment*, valued on the date of the bulk sale agreement; or (2) in all other cases, a sale not in the ordinary course of the seller's business *of more than half* of the seller's *inventory and equipment*, valued on the date of the bulk sale agreement. (Cf. former U.C.C. 6102(1) [transfer must be in bulk, not in ordinary course of transferor's business, and involve *substantial part* of materials, supplies, merchandise, or inventory of business]; 2C U.L.A. (Master Ed.), §6-102(1) [excluding equipment]; 47 *A.L.R.3d* 1114, 1132 [bulk transfers under Unif.Com.C. §6-102(1)]; for definition of "inventory," see U.C.C. 9102(a)(48); for definition of "equipment," see U.C.C. 9102(a)(33).)

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4. Exceptions.

4 Witkin Sum. Cal. Law Sales § 222

[§ 222] Exceptions.

U.C.C. 6103 exempts the following transfers:

- (1) Transfers made to secure payment or performance of an obligation. (U.C.C. 6103(c)(1).)
- (2) Transfers of collateral to secured parties under U.C.C. 9609 (see 4 *Summary* (10th), *Secured Transactions in Personal Property*, §178). (U.C.C. 6103(c)(2).)
- (3) Dispositions of collateral under U.C.C. 9610 (see 4 *Summary* (10th), *Secured Transactions in Personal Property*, §179). (U.C.C. 6103(c)(3).)
- (4) Retention of collateral under U.C.C. 9620 (see 4 *Summary* (10th), *Secured Transactions in Personal Property*, §191). (U.C.C. 6103(c)(4).)
- (5) Sales of assets encumbered by a security interest or lien, if all sales proceeds are applied in partial or total satisfaction of the debt secured by the security interest or lien, or if the security interest or lien is enforceable against the asset after it has been sold to the buyer and the net contract price is zero. (U.C.C. 6103(c)(5).) (See 86 *A.L.R.4th* 1104 [what constitutes "transfers in settlement or realization of a lien or other security interest" under Unif.Com.C. §6-103(3)].)
- (6) General assignments for the benefit of creditors or subsequent transfers by the assignee. (U.C.C. 6103(c)(6); see 1 *Summary* (10th), *Contracts*, §710.)
- (7) Sales by executors, administrators, receivers, trustees in bankruptcy, debtors in possession, or public officers under judicial process. (U.C.C. 6103(c)(7).)
- (8) Sales made in the course of judicial or administrative proceedings for dissolution or reorganization of an organization. (U.C.C. 6103(c)(8).)
- (9) Sales to a buyer whose principal place of business is in the United States and who: (a) not earlier than 21 days before the date of the bulk sale, obtains a list of claimants from the seller, or conducts a reasonable inquiry to discover

the claimants; (b) fully assumes the debts owed to those claimants; (c) is not insolvent after the assumption; and (d) records and publishes notice of the assumption within 30 days after the date of the bulk sale as provided in U.C.C. 6105 (see *infra*, §223). (U.C.C. 6103(c)(9); see U.C.C. 6103(d) [specifying content of notice].)

(10) Sales to a buyer whose principal place of business is in the United States and who: (a) fully assumes the debts incurred in the seller's business before the date of the bulk sale; (b) is not insolvent after the assumption; and (c) records and publishes notice of the assumption within 30 days after the date of the bulk sale as provided in U.C.C. 6105. (U.C.C. 6103(c)(10); see U.C.C. 6103(e) [specifying content of notice].)

(11) Sales to a new organization that was organized to take over and continue the seller's business, and which has its principal place of business in the United States if: (a) the buyer fully assumes the debts incurred in the seller's business before the date of the bulk sale; (b) the seller receives nothing from the sale except an interest in the new organization that is subordinate to the claims against the organization arising from the assumption; and (c) the buyer records and publishes notice of the assumption within 30 days after the date of the bulk sale as provided in U.C.C. 6105. (U.C.C. 6103(c)(11).)

(12) Sales of assets having a value of either (a) less than \$ 10,000 (net of liens and security interests); or (b) more than \$ 5 million on the date of the bulk sale agreement. (U.C.C. 6103(c)(12); see U.C.C. 6103(f) [presumptions as to value of assets]; cf. 2C U.L.A. (Master Ed.), Unif.Com.C. §6-103(3)(l) [upper limit of \$ 25 million].)

(13) Sales required by, and made pursuant to, statute. (U.C.C. 6103(c)(13).)

(14) Transfers of personal property where the property is immediately leased back to the transferor and either there has been compliance with C.C. 3440.1(h) (see *supra*, §216), or the transfer is exempt under C.C. 3440.1(k) (see *supra*, §216). (U.C.C. 6103(c)(14).)

(15) Transfers subject to and in compliance with *B. & P.C. 24070* et seq. (transfers of alcoholic beverage licenses), provided the transferee records and publishes notice of the transfer at least 12 business days before the transfer is to be consummated in the manner specified in U.C.C. 6105. (U.C.C. 6103(c)(15).)

(16) Transfers of goods in a warehouse, provided that a warehouse receipt has been issued and a copy is kept at the warehouseman's principal place of business and at the warehouse. (U.C.C. 6103(c)(16); see *supra*, §138.)

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C. Bulk Sales.

5. Notice to Creditors.

a. Requirement and Content of Notice.

4 Witkin Sum. Cal. Law Sales § 223

[§ 223] Requirement and Content of Notice.

(1) *In General.* U.C.C. 6104(b) requires that a buyer give notice of a bulk sale in accordance with U.C.C. 6105. (Cf. 2C U.L.A. (Master Ed.), Unif.Com.C. §§6-104, 6-105 [requiring preparation of list of claimants and schedule of distribution, and notice to claimants]; 47 A.L.R.3d 1114, 1135; 18 A.L.R.4th 1090.)

The notice must state: (a) that a bulk sale is about to be made; (b) the names and business addresses of the seller and buyer, and all other business names and addresses used by the seller within the past 3 years and listed under U.C.C. 6104(a); (c) the location and general description of the assets; (d) the place and anticipated date of the bulk sale; and (e) whether the bulk sale is subject to U.C.C. 6102.2, and if so, the matters required by U.C.C. 6106.2(f) (infra, this section). (U.C.C. 6105(a).)

(2) *Sales of \$ 2 Million or Less.* U.C.C. 6106.2 applies to bulk sales where the consideration is \$ 2 million or less and is substantially all cash and/or an obligation to pay cash in the future. (U.C.C. 6106.2(a); see infra, §226.) U.C.C. 6106.2(f) requires the notice to state "the name and address of the person with whom claims may be filed and the last date for filing claims, which shall be the business day before the date stated in the notice" under U.C.C. 6105(a)(4). (See Cal. Transactions Forms, 1 Business Transactions §§3:14 et seq., 3:61.)

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b. Recordation and Publication.

4 Witkin Sum. Cal. Law Sales § 224

[§ 224] Recordation and Publication.

At least 12 business days before the date of the bulk sale, the notice must be: (1) recorded in the office of the county recorder in the county or counties where the assets are located and, if different, in the county in which the seller is located; (2) published at least once in a newspaper of general circulation published in the judicial district where the assets are located and in the judicial district, if different, in which the seller is located, if in either case there is one, and if none, then in a newspaper of general circulation in the county in which the judicial district is located; and (3) delivered or sent by registered or certified mail to the county tax collector in the county or counties where the assets are located. If the notice is delivered from January 1 to May 7, it must be accompanied by a completed business property statement with respect to the property involved in the bulk sale, under Rev.C. 441. (U.C.C. 6105(b).)

If the property is located in more than one judicial district, then publication must be in a newspaper in the judicial district where the "greater portion of the tangible assets are located, on the date the notice is published, than in any other judicial district in this state and, if different, in the judicial district in which the seller is located." (U.C.C. 6105(b)(3).)

A "business day" is "any day other than a Saturday, Sunday, or day observed as a holiday by the state government." (U.C.C. 6105(b)(3).) (See *Gifford v. J & A Holdings* (1997) 54 C.A.4th 996, 1004, 63 C.R.2d 253 [buyer did not comply with recording requirement where notice was recorded less than 12 days before date of anticipated sale as specified in notice, and where buyer then attempted to remedy notice problem by extending close of escrow to date 12 days from date of recordation].)

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5. Notice to Creditors.

c. Auction Sales.

4 Witkin Sum. Cal. Law Sales § 225

[§ 225] Auction Sales.

U.C.C. 6104 and 6105 (supra, §§223, 224) apply to bulk sales by auction and bulk sales conducted by a liquidator on the seller's behalf. (U.C.C. 6108(a).) However, the written notice required under U.C.C. 6105(a) (supra, §223) must be accompanied by a statement that the sale is to be by auction or by liquidation; the name of the auctioneer or liquidator; and the time and place of the auction, or the time and place on or after which the liquidator will begin to sell assets on behalf of the seller. (U.C.C. 6108(a)(3); see *47 A.L.R.3d 1114, 1138.*)

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C. Bulk Sales.

5. Notice to Creditors.

d. Sales Through Escrow.

4 Witkin Sum. Cal. Law Sales § 226

[§ 226] Sales Through Escrow.

(1) *In General.* Purchasers in a bulk transfer situation often desire to protect themselves from claims of the transferor's creditors by conducting the sale through an escrow. U.C.C. 6106.4 specifies the duties of the parties whenever the notice is of such a transaction, and invites claimants to file their claims with the escrow agent. (On additional duties of the escrow holder under U.C.C. 6106.2, see *infra*, this section.)

(2) *Insufficient Deposit at Closing.* U.C.C. 6106.4 requires that the buyer deposit the full amount of the purchase price with the escrow agent. If at the time for closing the escrow, the amount deposited is insufficient to pay all claims filed, the *escrow agent must do the following*:

(a) *Delay closing and passage of title* for not less than 25 days nor more than 30 days, and, within 5 business days after the originally scheduled closing date, send written notice to each claimant who has filed a claim, stating the consideration available, the name of and the amount claimed by each claimant, the proposed distribution of available funds, the new date for passage of title, and the date of distribution, which may be no more than 5 days after the new date for passage of title. (U.C.C. 6106.4(a).)

(b) *Distribute the consideration* in the following *order of priorities*: (1) obligations owing to the United States; (2) secured claims, including statutory and judicial liens; (3) escrow and professional charges and broker's fees attributable directly to the sale; (4) wage claims given priority by *C.C.P. 1205*; (5) all other tax claims; (6) all other unsecured claims pro rata, including any deficiency claims of partially secured creditors. (U.C.C. 6106.4(b); cf. *Myzer v. Emark Corp.* (1996) 45 C.A.4th 884, 889, 53 C.R.2d 60 [under *C.C.P. 1205*, employees' claims for wages and benefits have priority over secured creditors' claims; opinion does not refer to U.C.C. 6106.4(b)].)

(c) To the extent that an obligation of the buyer to pay cash in the future is part of the consideration and the cash consideration is not sufficient to pay all claims filed in full, *apply all principal and interest received* on the obligation to the payment of claims in accordance with U.C.C. 6106.4(b) until they are paid in full, before making any payment to the seller. In that case, the notice under U.C.C. 6106.4(a) must state the amount, terms and due dates of the obligation and the portion of the claims expected to be paid thereby. (U.C.C. 6106.4(c).)

(3) *Duties of Buyers and Escrow Holders.* U.C.C. 6106.2 imposes on buyers and escrow holders handling transactions subject to the section (other than auction sales or sales conducted by a liquidator) the duty to pay those debts of the seller for which claims are due and owing. (U.C.C. 6106.2(b).) If the funds are insufficient to pay all claims, the procedures prescribed in U.C.C. 6106.4, *supra*, are to be followed. (U.C.C. 6106.2(d).) Security interests or other liens on the property are not affected unless voluntarily released. (U.C.C. 6106.2(g).)

If the seller disputes whether any claim is due or its amount, the buyer or escrow agent must withhold from distribution a specified amount, and must send written notice to the claimant that the amount will be paid to the seller unless attached within 25 days from the mailing of the notice. (U.C.C. 6106.2(c), which also specifies the consequences of attaching and failing to attach the property.)

Within 45 days of taking legal title to any property, the buyer or escrow agent must either pay the undisputed claims or file an interpleader suit. (U.C.C. 6106.2(e).)

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6. Effect of Noncompliance.

4 Witkin Sum. Cal. Law Sales § 227

[§ 227] Effect of Noncompliance.

(1) *In General.* Under U.C.C. 6107, a buyer's failure to comply with U.C.C. 6104 (see supra, §223) does not: (a) impair the buyer's rights in or title to the assets; (b) render the sale ineffective, void, or voidable; (c) entitle a creditor to more than a single satisfaction of its claim; or (d) create liability other than as provided in Division 6. (U.C.C. 6107(h); see 2C U.L.A. (Master Ed.), §6-107(8).)

(2) *Liability for Damages.* A buyer who fails to comply with U.C.C. 6104 is liable to a claimant for damages in the amount of the claim, reduced by any amount the claimant would not have realized if the buyer had complied. (U.C.C. 6107(a); see U.C.C. 6107(d), (e), (f) [limitation on amount of buyer's liability]; U.C.C. 6107(g) [precluding action by claimant whose claim is unliquidated or contingent].) The claimant has the burden of proving the validity and amount of the claim, and the buyer has the burden of proving the amount the claimant would not have realized if the buyer had complied. (U.C.C. 6107(b).)

A buyer who has made a good faith, commercially reasonable effort to comply with U.C.C. 6104 or to exclude the sale from Division 6 under U.C.C. 6103 (see supra, §222) is not liable to creditors for failure to comply with U.C.C. 6104. (U.C.C. 6107(c); cf. 2C U.L.A. (Master Ed.), Unif.Com.C. §6-107(1), (3)(b) [additionally exempting buyers who held good faith, commercially reasonable belief that Article 6 did not apply to sale in question]; and see *Gifford v. J & A Holdings* (1997) 54 C.A.4th 996, 1006, 1007, 63 C.R.2d 253 [where notice was not timely recorded, buyer's attempt to remedy problem by extending close of escrow to date 12 days from date of recordation did not constitute good faith, commercially reasonable effort to comply under U.C.C. 6107(c), supra; buyer was aware of creditor and could have given actual notice].)

Payment of the buyer's liability under U.C.C. 6107(a) discharges pro tanto the seller's debt to the creditor. (U.C.C. 6107(i).) A buyer has a right to reimbursement from the seller for any amount paid to a creditor under U.C.C. 6107(a), unless otherwise agreed. (U.C.C. 6107(j).)

(3) *Auction Sales.* In a single bulk sale, the cumulative liability of an auctioneer or liquidator for failure to comply with U.C.C. 6108 (see supra, §225) may not exceed "the amount of the net proceeds of the sale allocable to inventory and equipment sold less the amount of the portion of any part of the net proceeds paid to or applied for the benefit of a creditor which is allocable to the inventory and equipment." (U.C.C. 6108(a)(4).)

A payment made by an auctioneer or liquidator to a person to whom the auctioneer or liquidator is, or believes it is, liable under U.C.C. 6108 reduces pro tanto the auctioneer's or liquidator's cumulative liability under U.C.C. 6108(a)(4), *supra*. (U.C.C. 6108(b).)

(4) *Statute of Limitations*. An action against a buyer, auctioneer, or liquidator must be commenced within 1 year after the date of the bulk sale. (U.C.C. 6110(a).) If the buyer, auctioneer, or liquidator conceals that the sale has occurred, the limitation is tolled, and an action may be brought within the earlier of (a) 1 year after the person bringing the action discovers that the sale has occurred; or (b) 1 year after that person should have discovered that the sale has occurred, but not later than 2 years after the bulk sale. (U.C.C. 6110(b); see 3 *Cal. Proc.* (4th), *Actions*, §§448, 463.)

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(4) *Statute of Limitations*.

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §§481, 497.



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7. Applicability of Fraudulent Transfer Act.

4 Witkin Sum. Cal. Law Sales § 228

[§ 228] Applicability of Fraudulent Transfer Act.

In *Monastra v. Konica Business Machines, U.S.A.* (1996) 43 C.A.4th 1628, 51 C.R.2d 528, plaintiff obtained a \$ 400,000 judgment in an action for breach of contract and fraud, and then brought a new action to avoid certain transfers of assets by the judgment debtors (a corporation and its president). The new owners of the corporation's assets moved for summary judgment on the ground that the transfer of corporate assets had been carried out in compliance with the Bulk Sales Act, and that this compliance immunized the transfer from attack under the Fraudulent Transfer Act (C.C. 3439 et seq.; see 8 Cal. Proc. (4th), *Enforcement of Judgment*, §460 et seq.) and C.C. 3440 (supra, §215). The trial judge granted the motion. *Held*, reversed and remanded. The new owners' argument that if the Bulk Sales Act has been complied with, there can be no fraud as a matter of law, is "a preposterous assertion." It amounts to saying that if notice of a proposed bulk sale is properly published and recorded, "the parties to the sale may, with complete impunity, place all of the seller's assets out of the reach of any creditor who is unwary enough to miss the *single* publication and the notice in the county recorder's office, and it makes no difference if this is done with the specific intent to defraud such creditor." (43 C.A.4th 1636, 1637.) Nothing in the language, the historical background or the underlying policies of the bulk sales laws or the fraudulent transfer laws suggests that they are mutually exclusive. (43 C.A.4th 1637.) "[T]he purpose of bulk sales laws is to afford the fullest possible protection to creditors of persons who fraudulently transfer their stock in trade in bulk, by reaching a category of fraudulent bulk transfers that are not reached by the fraudulent transfer laws, *in addition to those transfers which have historically been covered by such laws*. In order to afford the essentially plenary protection intended by the Legislature, both statutory schemes must apply to bulk sales of stock in trade." (43 C.A.4th 1643.) Since plaintiff's papers in opposition to summary judgment established the existence of triable issues of fact as to all the elements of a fraudulent transfer or a transfer without delivery, he is entitled to proceed on his claims. (43 C.A.4th 1644.)

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Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §488 et seq.



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- D. Sale by Person Not the Owner.
1. Apparent Ownership or Authority: Estoppel.
a. General Principles.

4 Witkin Sum. Cal. Law Sales § 229

[§ 229] General Principles.

Title may be transferred by a person not the owner where the owner, by his or her conduct, is precluded from denying the seller's authority to sell. The same result is sometimes reached under the general equitable maxim stated in C.C. 3543: "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." (See *Conklin v. Benson* (1911) 159 C. 785, 793, 116 P. 34; *Democrat-Herald Publishing Co. v. Pettit* (1928) 94 C.A. 724, 727, 271 P. 910; *McKee v. Peterson* (1963) 214 C.A.2d 515, 523, 526, 29 C.R. 742; see also Rest.2d, Agency §175; 72 A.L.R.2d 342 [rights between assignee of conditional seller and subsequent buyer from conditional seller after repossession]; 67 Am.Jur.2d (2003 ed.), Sales §395 et seq.; 3 Summary (10th), Agency and Employment, §147.)

Mere delivery of possession is ordinarily insufficient to raise an estoppel, but, under the Commercial Code, entrustment of possession to a *dealer in the goods entrusted* gives the dealer the power to sell and transfer a good title in the ordinary course of business. (See *supra*, §137.)

The California pre-Sales Act statute only protected the buyer under an "executed sale." It was held that this did not apply to a *mortgagee*, and that the apparent authority of a dealer in possession of a car extended only to the *selling* of the car and not to the *mortgaging* of it. (*Pacific Finance Corp. v. Hendley* (1930) 103 C.A. 335, 337, 338, 284 P. 736, 285 P. 1048; *Pacific Finance Corp. v. Hendley* (1932) 119 C.A. 697, 701, 7 P.2d 391.) The Sales Act also appeared to deal solely with a buyer under a sale. (See former C.C. 1743, 1796.) Thus, a mortgagee could not rely upon mere apparent authority *to sell*, but was entitled to protection against the true owner only where the owner's conduct was such as to estop the owner to deny the authority of the dealer or agent *to mortgage*. (See *Pacific Finance Corp. v. Hendley, supra*, 119 C.A. 697.) But an estoppel was found in favor of a mortgagee under the general equitable maxim of C.C. 3543, *supra*. (See *McKee v. Peterson, supra*, 214 C.A.2d 522, 523, quoting the text, but holding the *Hendley* case not controlling.)

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D. Sale by Person Not the Owner.

1. Apparent Ownership or Authority: Estoppel.

b. Sale of Motor Vehicle.

4 Witkin Sum. Cal. Law Sales § 230

[§ 230] Sale of Motor Vehicle.

(1) *Unauthorized Sale of Floored Car by Dealer*. Motor vehicle dealers commonly arrange for a finance company to finance or "floor" their inventories. The arrangement usually permits the dealer to exhibit vehicles on the sales floor to obtain buyers, but prohibits sales without express authorization. In this situation, the doctrine of estoppel is applied in an extremely liberal manner to protect the bona fide purchaser against the secret title of the lender. (See *Commercial Credit Co. v. Barney Motor Co.* (1938) 10 C.2d 718, 721, 76 P.2d 1181; *Tharp v. San Joaquin Valley Sec. Co.* (1937) 20 C.A.2d 20, 25, 66 P.2d 230; *Bank of America v. National Funding Corp.* (1941) 45 C.A.2d 320, 333, 114 P.2d 49 [decided under Trust Receipts Act, former C.C. 3016.5, and holding entruster not protected because sale was to bona fide purchaser in ordinary course of trade]; cf. *McKee v. Peterson* (1963) 214 C.A.2d 515, 522, 29 C.R. 742 [applying estoppel rule in favor of flooring mortgagee and against seller to the dealer after dealer's check was dishonored]; and see 4 Summary (10th), *Secured Transactions in Personal Property*, §10 et seq.)

In *Siegel v. Bayless* (1952) 113 C.A.2d 661, 663, 248 P.2d 968, the same result was reached on a different theory. The used car dealer was *authorized to sell*; i.e., he was a *factor* with ostensible authority to deal with the property as his own. (See C.C. 2369; *Pacific Finance Corp. v. Foust* (1955) 44 C.2d 853, 856, 285 P.2d 632 [following *Siegel*]; 3 Summary (10th), *Agency and Employment*, §44.)

(2) *Sale Without Transfer of Certificate*. The estoppel doctrine has also been invoked to protect the buyer in good faith despite the seller's failure to comply with the statutory requirement of transfer of the certificate of ownership (infra, §235 et seq.). For some years, *Veh.C. 5600* and *5601* (former *Veh.C. 186*) contained an express recognition of the estoppel exception. This was eliminated by amendment in 1943, but the courts have nevertheless consistently applied the equitable doctrine that title may pass by estoppel. (See *Parke v. Franciscus* (1924) 194 C. 284, 293, 228 P. 435; *Kenny v. Christianson* (1927) 200 C. 419, 423, 253 P. 715; *Wargin v. Wargin* (1947) 29 C.2d 843, 845, 180 P.2d 349 ["It may be assumed that the omission of the quoted provision in the section as it now reads did not change the law regarding the application of the principles of estoppel in proper cases"; no estoppel found, however]; *Moss v. Bowman* (1931) 116 C.A. 720, 725, 3 P.2d 377.)

Thus, in *Kenny v. Christianson*, supra, plaintiff owner delivered the car to a secondhand dealer, with instructions to find a buyer. The dealer sold to defendant and absconded with the purchase price. He had not transferred the certificate

of ownership to defendant. Plaintiff sued to recover the car. *Held*, he could not recover it from one who had purchased it in good faith and for valuable consideration. (200 C. 423; see 15 Cal. L. Rev. 505; 28 Cal. L. Rev. 64, 78; cf. *Siegel v. Bayless*, *supra* [local sale of car of Michigan owner with Michigan registration; held that Veh.C. registration requirements do not apply to out-of-state vehicle never registered in California].)

The importance of this rule becomes manifest in view of the practice of dealers to handle the transfer of the certificate themselves. In *Dennis v. Bank of America* (1939) 34 C.A.2d 618, 94 P.2d 51, plaintiff bought a used car from S, a dealer, who delivered possession and promised to have the certificate transferred. S then fraudulently sold the same car on conditional sale to M, and financed the contract with defendant bank, which had the certificate transferred to it. Later S and M rescinded their contract, and the bank then claimed a lien on the car. *Held*, plaintiff should prevail over the bank. The dealer was estopped to set up his own fraudulent failure to transfer the certificate, and the bank, as his assignee, was subject to the same defense. (34 C.A.2d 624.) (See *Carpenter v. Devitt* (1942) 49 C.A.2d 473, 475, 122 P.2d 79; *LeGrand v. Russell* (1942) 52 C.A.2d 279, 280, 126 P.2d 136 [buyer prevailed over execution creditor of seller, though certificate not yet transferred].)

(3) *Effect of Buyer's Negligence*. The doctrine of estoppel only protects an innocent buyer in good faith who is free from negligence. (See C.C. 3543, *supra*, §229.) Thus, in *Freitas v. Marsh* (1945) 70 C.A.2d 711, 161 P.2d 565, plaintiff owner allowed S, a peddler, to use his car, and also gave him the certificate of ownership in blank *for the purpose of obtaining a new registration certificate* (the old one had been lost). S sold the car to defendant, an innocent purchaser, indorsing the certificate of ownership by a crude forgery. The trial court's judgment allowing plaintiff to recover the car was affirmed. As to *agency*, S's authority was simply to procure a new registration certificate. As to *estoppel*, the elements of possession and indicia of ownership were superficially present, but the negligence of plaintiff was balanced by that of defendant, who bought the car from a stranger, without investigation of his ownership, and failed to make any adequate examination of the forged signatures. (70 C.A.2d 713.)

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2. Buyer Under Conditional Sale.

4 *Witkin Sum. Cal. Law Sales* § 231

[§ 231] Buyer Under Conditional Sale.

If a conditional buyer transfers the property to a third party in violation of the terms of the contract, the latter acquires no title, and the seller may repossess the goods. (On regulation of vehicle sales, see *infra*, §239 et seq.) Nevertheless, it has been held that the innocent third-party purchaser may keep the property upon payment of the entire balance due to the seller. (*Davies-Overland Co. v. Blenkiron* (1925) 71 C.A. 690, 694, 236 P. 179.) This holding is not based on estoppel, since the seller has done nothing to raise an estoppel; i.e., the seller has transferred possession only, and not the indicia of ownership. The decisions simply recognize that the title is in the seller solely for the purpose of securing payment of the price, and that an innocent purchaser who pays the balance and thus performs all of the contractual obligations of the transferor (the original buyer) to the seller should be protected.

In *Walker v. Houston* (1932) 215 C. 742, 12 P.2d 952, the same reasoning was applied where the buyer gave a *chattel mortgage*. Upon default by the buyer, the seller repossessed. The mortgagee tendered the balance of the price, but the seller refused to give up the property. *Held*, the tender divested the seller's title. "[T]he title reserved by a conditional seller for the purpose of securing payment of the purchase price is no less an incident of an obligation to pay money than a mortgage or pledge. The title is reserved for security only. The buyer has the full right of possession and use unless he defaults, and may secure title by performance of his obligation without any further assent by the seller. The sole interest of the seller is in the receipt of the price, and his reserved title cannot be used for any other purpose." (215 C. 746.) (See 23 *Cal. L. Rev.* 560.)

In *Martin v. Hollins* (1931) 118 C.A. 561, 5 P.2d 899, the court was still more liberal in its treatment of an innocent purchaser from the buyer. The buyer defaulted, the seller demanded the goods, and the second purchaser refused to give them up. The seller sued to recover them, and the court gave a *conditional judgment* in favor of the purchaser, provided that he made the final payment on the price. (118 C.A. 565.) (See 21 *Cal. L. Rev.* 60; *Guerin v. Kirst* (1949) 33 C.2d 402, 411, 202 P.2d 10 [approving *Martin v. Hollins*].)

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3. Seller With Voidable Title.

a. General Principles.

4 Witkin Sum. Cal. Law Sales § 232

[§ 232] General Principles.

(1) *Power To Transfer Good Title*. "A person with voidable title has power to transfer a good title to a good faith purchaser for value." (U.C.C. 2403(1), and see Official Comment 1; on good faith purchaser for value, see U.C.C. 1201(19), (43); and see 3A Anderson 3d (2002 Rev. ed.), §2-403:49 et seq.; C.E.B., 1 UCC Sales and Leases, §12.6; 67 *Am.Jur.2d* (2003 ed.), *Sales* §403 et seq.; 17 *A.L.R.3d* 1010, 1123; cf. *Wendling Lumber Co. v. Glenwood Lumber Co.* (1908) 153 C. 411, 417, 95 P. 1029 [under former law, seller could treat sale induced by fraud as void until buyer transferred to bona fide purchaser].)

(2) *Transactions Creating Voidable Title*. The Commercial Code provides that a voidable title is created in a transferee when goods are delivered under a transaction of purchase even though: (a) the transferor was deceived as to the identity of the purchaser; (b) delivery was in exchange for a check and the check is dishonored; (c) the transaction was agreed to be a "cash sale"; or (d) delivery was procured through criminal fraud. (See U.C.C. 2403(1); 3A Anderson 3d (1995 Rev. ed.), §2-403:56 et seq.; 74 *Harv. L. Rev.* 1455 [face-to-face transaction involving mistake of identity].)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Power To Transfer Good Title*. U.C.C. 1201(19), defining "good faith," and U.C.C. 1201(43), defining "value," were renumbered U.C.C. 1201(20) and U.C.C. 1204, respectively, in 2006.



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D. Sale by Person Not the Owner.

3. Seller With Voidable Title.

b. Illustrations.

4 *Witkin Sum. Cal. Law Sales* § 233

[§ 233] Illustrations.

(1) *Cash Sale Without Payment.* Sometimes a transaction gives every appearance of a normal sale of goods; i.e., merchandise is delivered and accepted so that nothing remains to be done by the seller. But the parties intend the payment to be in cash, and the buyer does not pay at all or gives a bad check and then resells to a bona fide purchaser. Under the Code, the first transaction creates a voidable title (see *supra*, §232), and the buyer's resale transfers a good title. (U.C.C. 2403(1); see 3 *Hastings L. J.* 162; 15 *So. Cal. L. Rev.* 346; 24 *So. Cal. L. Rev.* 202.)

The prior cases in California and most jurisdictions reached an opposite result on the theory that the parties to a cash sale did not *intend* title to pass until payment. Consequently the buyer did not have even voidable title, and could not give title to a third party. (See *Clark v. Hamilton Diamond Co.* (1930) 209 C. 1, 3, 284 P. 915 ["as between the parties, upon the check being dishonored, the seller is clearly entitled to resume possession of the property"]; *McKee v. Peterson* (1963) 214 C.A.2d 515, 519, 520, 29 C.R. 742; 1 *Hastings L. J.* 111; 15 *So. Cal. L. Rev.* 340.)

(2) *Contracts of Minors and Incompetents.* The rule as to passage of good title by a seller with voidable title (*supra*, §232) is presumably applicable to sales that are subject to disaffirmance under *Family C. 6710*. In any event, analogous protection to third-party purchasers is provided by *Family C. 6713*. (See 1 *Summary* (10th), *Contracts*, §33.) Where, however, the contracts by a minor or person of unsound mind are not merely voidable but void, they need not be disaffirmed or rescinded (see 1 *Summary* (10th), *Contracts*, §28 et seq.), and the protection of U.C.C. 2403(1) would not be available. In the field of sales, these would include: (a) sale by a person *under* 18 of personal property not in his or her immediate possession or control; (b) sale by a *minor* through an agent; (c) sale by a person "entirely without understanding" or whose incapacity has been judicially determined. (*Family C. 6701*; C.C. 38, 39, 40.)

SUPPLEMENT: [This section is current through the latest supplement]



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4 Witkin Sum. Cal. Law Sales § 234

[§ 234] Seller With Void Title.

In *Suburban Motors v. State Farm Mut. Auto. Ins. Co.* (1990) 218 C.A.3d 1354, 268 C.R. 16, defendant insurance company paid its policyholder for the loss of a vehicle that had been stolen, whereupon the policyholder transferred title to defendant. Sometime after the theft, the vehicle's identification number was altered. The California Department of Motor Vehicles issued documents of title under the altered number based on a certificate of title the thief had apparently obtained from Louisiana after presenting Louisiana with false information. Plaintiff automobile dealer eventually acquired the vehicle after it had passed through a succession of owners who had purchased it without knowledge that it had been stolen. Plaintiff leased the vehicle to an individual, who later surrendered it to the Highway Patrol after the Patrol discovered that it had been stolen. After the Patrol turned the vehicle over to defendant, plaintiff sued to recover possession. *Held*, defendant's title, obtained directly from its policyholder who had been the vehicle's lawful owner, was superior to the claim of plaintiff, a bona fide purchaser for value under a chain of title traceable to a thief.

(a) *Plaintiff's title was void, not voidable.* U.C.C. 2403 provides that a person with voidable title has power to transfer good title to a good faith purchaser for value. (See *supra*, §232.) However, the statute does not validate a second chain of title to a vehicle spuriously created after the vehicle was stolen. (218 C.A.3d 1359.) Here, plaintiff's title was derived from a thief, despite an authentic certificate of title, and was therefore *void*, not merely voidable. (218 C.A.3d 1361.)

(b) *Full title doctrine did not apply.* The "full title" statute (*Veh.C. 6300 et seq.*; see *infra*, §236) requires all security interests to be listed on the statutory certificate of ownership, and a purchaser may rely on that certificate and need not check elsewhere to determine whether a security interest has been recorded. Thus, the statute operates to defeat the claims of holders of an unlisted security interest as against the claims of good faith purchasers. Here, however, defendant did not claim a security interest--it claimed outright, unencumbered ownership under the title of the owner as against plaintiff, who held under a second chain of title created by the thief. "In these circumstances it would be impossible for one in the position of State Farm to protect its interest under the full title doctrine. ... Apart from the fact that State Farm was not a lender as contemplated by the full title doctrine, it could not protect its valid, unencumbered interest by giving notice to good faith purchasers who, unbeknown to State Farm, take under a spurious chain of title dependent on 'laundered' title documents." (218 C.A.3d 1363.)

SUPPLEMENT: [This section is current through the latest supplement]



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A. Sale of Motor Vehicle.

1. Registration With Department.

a. Nature of Requirement.

1. Issuance of Certificate and Card.

4 Witkin Sum. Cal. Law Sales § 235

[§ 235] Issuance of Certificate and Card.

The Vehicle Code (§5600 et seq.) makes an additional requirement for the passage of title from seller to buyer in the sale of a *motor vehicle*. The title must be registered with the *Department of Motor Vehicles* at Sacramento, which issues a *certificate of ownership* (pink slip) and a *registration card* (white slip). (*Veh.C. 4450* et seq.; see generally on registration practice, *7A Am.Jur.2d* (1997 ed.), *Automobiles and Highway Traffic* §55 et seq.; *27 A.L.R.4th* 843 [exempt vehicles].)

The certificate of ownership is issued to the *legal owner* of the vehicle. (*Veh.C. 4450*; see *Veh.C. 370* [defining legal owner as person holding a security interest subject to provisions of Uniform Commercial Code, or lessor under specified leasing agreement]; *Veh.C. 6302* [secured party as legal owner].) The registration card is issued to the *owner*. (*Veh.C. 4450*; see *Veh.C. 460* [defining owner as including person entitled to use and possession of vehicle under security agreement or specified leasing agreement].) Where no security interest has been created, ownership is not divided and both the certificate and the card are issued to the owner. (*Veh.C. 4450*.)

Detailed provision is made for registration of and transfer of title to coowners in joint tenancy, tenancy in common, or as community property. (*Veh.C. 4150.5, 5600.5*; see *13 Summary* (10th), *Personal Property*, §35.)

The principal purposes of the registration requirements are the protection of innocent purchasers and the identification of vehicles and persons responsible in the event of accidents. (See *Stoddart v. Peirce* (1959) 53 C.2d 105, 117, 346 P.2d 774 [comprehensive discussion of statutory history and intent]; *Government Employees Ins. Co. v. Superior Court* (2000) 79 C.A.4th 95, 100, 101, 93 C.R.2d 820 ["As a 'full-title' state, California's primary interest is in providing that anyone doing business with the purported owner of a motor vehicle may depend upon the state of the record title"]; on civil liability after transfer of vehicle, see *6 Summary* (10th), *Torts*, §1265 et seq.)

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SUPPLEMENT: [This section is current through the latest supplement]

See *7A Am.Jur.2d* (2007 ed.), *Automobiles and Highway Traffic* §57 et seq. (New) *Consumer Motor Vehicle Recovery*

Corporation: *Veh.C. 12200* et seq., added in 2007, create the Consumer Motor Vehicle Recovery Corporation, one of the purposes of which is to reimburse a consumer for economic loss resulting from the failure of a dealer or lessor-retailer to remit license or registration fees received from, or contractually obligated to be paid by, the consumer to the Department of Motor Vehicles. *Veh.C. 4456.3*, also added in 2007, requires the department to collect a fee from each dealer or lessor-retailer for each vehicle sold by the dealer or lessor-retailer. The fee is transferred to the Consumer Motor Vehicle Recovery Corporation to support its purposes.



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a. Nature of Requirement.

2. Indorsement and Transfer.

4 *Witkin Sum. Cal. Law Sales* § 236

[§ 236] Indorsement and Transfer.

(1) *Indorsement and Delivery of Documents.* In making a subsequent sale, the owner must indorse the certificate of ownership to the buyer and deliver it to him or her. (*Veh.C. 5600(a)(1)*, formerly also requiring delivery of the registration card.) The buyer must forward the certificate to the Department within 10 days of receipt. (*Veh.C. 5600(a)(1), 5902.*) The buyer must also include payment for any applicable fees (*Veh.C. 5600(a)(1), 5902(a)*) and the amount required under the use tax provisions of the Revenue Code (*Veh.C. 5600(a)(1)*; see 9 *Summary* (10th), *Taxation*, §355 et seq.). An alternative procedure is for the seller to forward the documents to the Department. (*Veh.C. 5600(a)(2).*) (For a general discussion of the statutory history, see *Rainey v. Ross* (1951) 106 C.A.2d 286, 291, 292, 235 P.2d 45.)

(2) *Failure To Deliver Documents.* It is unlawful for the seller to fail or neglect to deliver the certificate of ownership and, when having possession of it, the registration card, to the buyer (*Veh.C. 5753*; see 27 *So. Cal. L. Rev.* 95), and lack of compliance with the statute may render the sale void (*infra*, §237). But these requirements do not apply to vehicles not previously registered in California. (*Siegel v. Bayless* (1952) 113 C.A.2d 661, 664, 248 P.2d 968.) And a dealer may deliver the documents directly to the Department, unless the buyer makes a written demand for the certificate. (*Veh.C. 5753.*)

(3) *Notice by Owner or Dealer to Department.* The owner or dealer must, within 5 calendar days, give notice of the sale or transfer to the Department on a form provided by it. (*Veh.C. 5900(a), 5901(a).*) Notice must also be given of the mileage of the vehicle at the time of sale or transfer as shown on its odometer. (*Veh.C. 5900(b), (c), 5901(b), (c).*) (See *People v. Oatas* (1989) 207 C.A.3d Supp. 18, 22, 256 C.R. 87 [dealer subject to criminal liability for failure to report transfers under *Veh.C. 5901*].)

When a registered owner sells or transfers a vehicle through a dealer conducting a wholesale motor vehicle auction, the owner must furnish that dealer with the information required by *Veh.C. 5900(a), (b)*. (*Veh.C. 5900(c).*)

(4) *Owner or Legal Owner as Transferor.* The owner may transfer his or her title or interest in the vehicle. The legal title and interest of the legal owner are unaffected, but the legal owner must sign the certificate. (*Veh.C. 5751.*)

The title or interest of the *legal owner* may be assigned without the owner's consent and without affecting the owner's interest. (*Veh.C.* 5603, 5750.) (On persons permitted to sell motor vehicles, see *Veh.C.* 12120, 12121.)

(5) *Involuntary and Security Transfers*. Special provision is made for involuntary transfers, such as the taking of possession by a secured party (see *Veh.C.* 5601, 5909), and for security transfers subject to the provisions of the Commercial Code (see *Veh.C.* 5601, 5907, 5908, 6300, 6301; on attachment, see 6 *Cal. Proc.* (4th), *Provisional Remedies*, §165 et seq.).

SUPPLEMENT: [This section is current through the latest supplement]

(5) *Involuntary and Security Transfers*.

Cross-Reference: 6 *Cal. Proc.* (5th), *Provisional Remedies*, §164 et seq.



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1. Registration With Department.

b. Effect of Noncompliance.

1. Sale Void.

4 Witkin Sum. Cal. Law Sales § 237

[§ 237] Sale Void.

A purported transfer of title or interest, other than an involuntary or security transfer, that fails to comply with the requirements of *Veh.C. 5600* (supra, §236), is ineffective. (*Veh.C. 5600, 5601*; see *Ludwig v. Steger* (1929) 99 C.A. 235, 237, 238, 278 P. 494 [buyer held not liable on note for price, title still in seller]; *Sly v. American Indem. Co. of Galveston, Texas* (1932) 127 C.A. 202, 206, 15 P.2d 522; *San Joaquin Valley Sec. Co. v. Prather* (1932) 123 C.A. 378, 384, 11 P.2d 45; *Coca-Cola Bottling Co. v. Feliciano* (1939) 32 C.A.2d 351, 353, 89 P.2d 686; see generally 28 Cal. L. Rev. 64; cf. *Thompson v. Sprague* (1951) 107 C.A.2d 647, 650, 237 P.2d 275 [refusal to deliver certificate of registration (white slip) for 5 months; held ground for rescission of sale].) However, a buyer of a car who takes delivery has sufficient ownership to contract validly for casualty insurance, despite the fact that registration with the Department does not take place until later. (*Dean v. Niagara Fire Ins. Co.* (1937) 24 C.A.2d Supp. 762, 766, 68 P.2d 1021.)

One distinction must be noted: failure to deliver a certificate of ownership, as required by *Veh.C. 5753* (supra, §236), cannot be used by a secured creditor to void a sale between a dealer and a buyer. (*Brasher's Cascade Auto Auction v. Valley Auto Sales & Leasing* (2004) 119 C.A.4th 1038, 1065, 15 C.R.3d 70.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Quartz of Southern Calif. v. Mullen Bros.* (2007) 151 C.A.4th 901, 909, 61 C.R.3d 54 [where auto auction business sold vehicles to dealer, and dealer sold vehicles to purchasers under conditional sales contracts and sold contracts to finance company without paying auction business, auction business retained title to vehicles unimpaired by any security interests; finance company acquired no security interests from dealer because dealer did not perfect them under Vehicle Code].



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- b. Effect of Noncompliance.
2. Exceptions.

4 Witkin Sum. Cal. Law Sales § 238

[§ 238] Exceptions.

Although compliance with *Veh.C. 5600* is supposedly essential to the passage of title (see *supra*, §237), and title ordinarily is in the person named in the certificate, this result is not invariable:

(1) Title may pass to a buyer by *estoppel*, despite failure to transfer the certificate. (See *supra*, §230.)

(2) Title may be successfully asserted by a person other than the one named. Thus, in *Lynn v. Herman* (1946) 72 C.A.2d 614, 165 P.2d 54, a husband gave a community car to plaintiff donee, who had the certificate issued in her name. *Held*, the wife could show her community interest and set aside the gift. (72 C.A.2d 616.) And in *Liberty Mut. Fire Ins. Co. v. McKenzie* (2001) 88 C.A.4th 681, 105 C.R.2d 910, an insured transferred title of a truck into the name of his deceased father. *Held*, for purposes of insurance recovery after the truck was stolen, the insured could assert that he was the true owner. "DMV records are not conclusive on the issue of ownership." (88 C.A.4th 687.) (See also *Henry v. General Forming, Ltd.* (1948) 33 C.2d 223, 226, 200 P.2d 785 [person in whose name car was registered was merely resulting trustee for another who paid the price]; *Getz v. Whisenant* (1949) 93 C.A.2d 182, 188, 208 P.2d 708; *Gates v. Levers* (1951) 108 C.A.2d 131, 133, 238 P.2d 143 [true owner was entitled to sue for rescission, though he had, for convenience, placed registration in sister's name].)

(3) Tort liability of the owner under the driving with permission law is not wholly dependent upon transfer of the certificate. (See 6 *Summary* (10th), *Torts*, §1265 et seq.)

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SUPPLEMENT: [This section is current through the latest supplement]



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- a. Nature and Purpose of Statute.

4 *Witkin Sum. Cal. Law Sales* § 239

[§ 239] Nature and Purpose of Statute.

The Automobile Sales Finance Act (Rees-Levering Act) greatly revised and expanded the prior law dealing with motor vehicle financing, and embodied features of the Unruh Act (see *infra*, §263 et seq.) and other statutes. (See C.C. 2981 et seq.; *Hernandez v. Atlantic Finance Co.* (1980) 105 C.A.3d 65, 69, 164 C.R. 279; for a comprehensive analysis of the Act, see 10 U.C.L.A. L. Rev. 125; on the prior law, see generally 12 *Hastings L. J.* 312; 2 *Stanf. L. Rev.* 362; 7 U.C.L.A. L. Rev. 624; *Carter v. Seaboard Finance Co.* (1949) 33 C.2d 564, 570, 203 P.2d 758; see also Cal. Civil Practice, 5 Business Litigation, §58:1 et seq.; Cal. Transactions Forms, 5 Business Transactions §32:88 et seq.; 63 *Harv. L. Rev.* 874 [nature and purpose of statutes regulating installment sales of various commodities]; 14 *A.L.R.3d* 330 [statutory regulation in this field]; on federal law, see 4 *U.C. Davis L. Rev.* 179 [Truth in Lending Act]; for the Automobile Leasing Act, see 13 *Summary* (10th), *Personal Property*, §193 et seq.)

The Act is designed to protect the automobile purchaser from abusive selling practices by extensive disclosure requirements (*infra*, §242), limitation of charges (*infra*, §245), and the establishment of procedures in the event of the buyer's default (*infra*, §250 et seq.).

SUPPLEMENT: [This section is current through the latest supplement]



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 - b. Scope and Exclusions.

4 *Witkin Sum. Cal. Law Sales* § 240

[§ 240] Scope and Exclusions.

(1) *Contract or Order*. The regulations apply not only to conditional sales contracts, but to instruments substantially equivalent and used for the same purpose, such as chattel mortgages and bailment or leasing contracts that contemplate ownership by the bailee or lessee upon compliance with the contract terms. (C.C. 2981(a); cf. *Shapiro v. Ogle* (1972) 28 C.A.3d 261, 265, 104 C.R. 553 [transaction was not credit sale within Act where contract was for cash on delivery with credit for downpayment].) They are also applicable to any "purchase order," defined as "a sales order, car reservation, statement of transaction or any other such instrument used in the conditional sale of a motor vehicle pending execution of a conditional sale contract." (C.C. 2981(l); see 10 U.C.L.A. L. Rev. 127.)

The regulations do not apply, however, to any bailment or leasing agreement that limits the bailee's or lessee's maximum liability upon completion or termination of the agreement to the vehicle's value at that time. (C.C. 2981.5, added in 1973 to modify *Thomas v. Wright* (1971) 21 C.A.3d 921, 924, 98 C.R. 874 [holding Act applicable to leasing agreement under which lessee was required to pay sum exceeding value of vehicle, and bore all depreciation loss]; see 5 *Pacific L. J.* 297.)

(2) *Commercial Seller*. The regulations do not apply to casual sales by private sellers. "Seller" is defined as "a person engaged in the business of selling or leasing motor vehicles under conditional sale contracts." (C.C. 2981(b); see 10 U.C.L.A. L. Rev. 130.)

(3) *Commercial Buyer*. The regulations do not apply to commercial buyers. "Motor vehicle" is defined as "any vehicle required to be registered under the Vehicle Code which is bought for use primarily for personal or family purposes, and does not mean any vehicle which is bought for use primarily for business or commercial purposes or a mobilehome ... sold on or after July 1, 1981." (C.C. 2981(k) [motor vehicle does not include trailer which is sold in conjunction with vessel and which comes within definition of goods under C.C. 1802.1]; see *San Jose Autocar White Co. v. Williamson* (1967) 249 C.A.2d 619, 621, 57 C.R. 692 [sale of two tractor-trucks to husband and wife engaged in trucking business; Act inapplicable]; 10 U.C.L.A. L. Rev. 131.) (On the law prior to 1961, which applied to commercial vehicles, see *Ryan v. Mike-Ron Corp.* (1964) 226 C.A.2d 71, 77, 37 C.R. 794.)

(4) *Immediate Buyer*. The protection of the Act extends only to the initial purchaser. "Buyer" is defined as "the

person who buys or hires a motor vehicle under a conditional sale contract." (C.C. 2981(c); see *10 U.C.L.A. L. Rev.* 129.)

(5) *Loan by "Supervised Financial Organization."* The regulations do not affect loans made to purchasers by state or federally supervised lenders. (C.C. 2982.5.) This exemption, however, extends only to independent private negotiations between the buyer and lender, without involvement of the seller. (*Hernandez v. Atlantic Finance Co.* (1980) 105 C.A.3d 65, 75, 78, 164 C.R. 279 [exemption unavailable where seller and financing agency sought to evade requirements of Act]; *Eldorado Bank v. Lytle* (1983) 147 C.A.3d Supp. 17, 20, 21, 195 C.R. 499 [exemption unavailable, despite absence of scheme by seller and lender to evade requirements of Act, where seller prepared loan paperwork and took it to lender]; and see *Kunert v. Mission Financial Services Corp.* (2003) 110 C.A.4th 242, 252, 254, 1 C.R.3d 589 [arrangement under which automobile was purchased through conditional sale contract between purchaser and dealer, with dealer then assigning contract to finance company and company paying dealer portion of finance charges, did not violate prohibition of C.C. 2982.5(b) against seller's receipt of commission for assisting purchaser to obtain loan, and did not constitute sham transaction designed to evade requirements of Act].)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Commercial Buyer.* The quoted portion of C.C. 2981(k) was amended in 2005 to change "which" to "that" in both of its appearances.



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 - 1. Form and Content of Contract.
 - aa. Written and Signed.

4 Witkin Sum. Cal. Law Sales § 241

[§ 241] Written and Signed.

The contract must be in writing and signed by the buyer and seller or their representatives. If printed, the type must be no smaller than 6-point. (C.C. 2981.9.) All agreements relating to the cost and terms of payment, including any promissory notes or other evidences of indebtedness, must be contained in a single document. (C.C. 2981.9; see *10 U.C.L.A. L. Rev. 132.*)

The agreement must be complete: "The seller shall not obtain the signature of the buyer to a contract when it contains blank spaces to be filled in after it has been signed." (C.C. 2981.9; see *10 U.C.L.A. L. Rev. 134.*)

West's Key Number Digest, Sales k.1.5

SUPPLEMENT: [This section is current through the latest supplement]



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 - bb. Disclosure of Cost Items.

4 Witkin Sum. Cal. Law Sales § 242

[§ 242] Disclosure of Cost Items.

(1) *In General.* Every conditional sale contract involving the sale of a motor vehicle must contain the disclosures required by Regulation Z (infra, this section) whether or not Regulation Z applies to the transaction. (C.C. 2982.) If all or a portion of the downpayment (defined in C.C. 2981(f)) is to be deferred, such deferred payment must be reflected in the payment schedule disclosed pursuant to Regulation Z. (C.C. 2982(c).)

C.C. 2982(a) requires an "itemization of the amount financed," which involves the following disclosures:

(a) An amount arrived at by adding (1) the total cash price (defined in C.C. 2981(e)), itemized as specified; (2) the amounts to be paid to any public officer for: license; registration, transfer, and titling fees; and California tire fees imposed under *Pub.Res.C. 42885*; (3) the amount of premiums for insurance policies, excluding any premiums included in the finance charge; and (4) the state fee for issuance of a certificate of compliance or noncompliance with, or waiver of, air pollution standards. (See *Winters v. Security Pac. Nat. Bank* (1975) 49 C.A.3d 510, 514, 122 C.R. 619 [former C.C. 2981(i), replaced by C.C. 2981(j), precludes addition of insurance costs to balance for which buyer becomes obligated after contract is entered into].)

(b) The amount of the buyer's downpayment, itemized as specified.

(c) The amount of any administrative finance charge, labeled "prepaid finance charge."

(d) The difference between the amount specified in (a), supra, and the sum of the amounts specified in (b) and (c), supra, labeled "amount financed."

Other disclosures of cost items required by C.C. 2982 include a brief description of any property being traded in that is included in the downpayment (C.C. 2982(d)), and the method by which the finance charges (defined in C.C. 2981(i)) are determined, on a precomputed or simple-interest basis, plus the charges when there is prepayment of the loan (C.C. 2982(f)). (On similar provisions of the law prior to 1961, see *City Lincoln-Mercury Co. v. Lindsey* (1959) 52

C.2d 267, 273, 339 P.2d 851; Bratta v. Caruso Car Co. (1958) 166 C.A.2d 661, 664, 333 P.2d 807; see also 14 A.L.R.3d 330 [statutory disclosure requirements generally]; on limitation of finance charges and prohibition of precomputed interest in certain contracts, see *infra*, §245; for definitions of precomputed basis and simple-interest basis, see *infra*, §245.)

Any amount charged by the seller for document preparation must be disclosed. (C.C. 2982(a)(1)(B).) Where such a fee is imposed, the contract must contain a disclosure that it is not a governmental fee. (C.C. 2982(n).)

(2) *Compliance With Regulation Z.* The contract must also meet the disclosure requirements of Regulation Z, promulgated under the federal Consumer Credit Protection Act (Truth in Lending Act). (See 12 C.F.R. §226.1 et seq.; 15 U.S.C., §1601 et seq.; 2 Fonseca 3d, Handling Consumer Credit Cases, Chap. 17; 24 *Stanf. L. Rev.* 793; 4 *U.C. Davis L. Rev.* 124, 179.) C.C. 2982(m) (formerly C.C. 2982(g)) attempts to deal with the problems of inconsistent disclosure requirements and double disclosure. (See 4 *U.C. Davis L. Rev.* 148.) It permits disclosure "in any manner, method, or terminology required or permitted under Regulation Z, as in effect at the time that disclosure is made, except that permitted by paragraph (2) of subdivision (c) of Section 226.18 of Regulation Z, provided that all of the requirements and limitations set forth in subdivision (a) of this section are satisfied." (See 4 *U.C. Davis L. Rev.* 163; for definition of "Regulation Z," see C.C. 2981(m).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.*

Itemization of amount financed: See *Thompson v. 10,000 RV Sales (2005) 130 C.A.4th 950, 971, 976, 31 C.R.3d 18* [motor home dealer violated C.C. 2982(a) where, for financing purposes, it increased stated cash price to include over-allowance on trade-in vehicle in credit transaction; there was no evidence that inflated trade-in value, which was recaptured on sale of new vehicle, was bargained for, and absence of full and fair disclosure prevented buyer from having meaningful choice in purchase transaction].



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CHAPTER V - Sales

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- A. Sale of Motor Vehicle.
 - 2. Formal Requisites of Conditional Sale.
 - c. Regulatory Provisions.
 - 1. Form and Content of Contract.
 - bb-1. (New) Disclosures Separate From Contract.

4 Witkin Sum. Cal. Law Sales § 242A

[§ 242A] (New) Disclosures Separate From Contract.

C.C. 2982.2, added in 2005 and amended in 2006, requires specified disclosures, in at least 10-point type, "in a document that is separate from the conditional sale contract and a purchase order." (C.C. 2982.2(b).) The disclosures must include:

- (1) A description and the price of each item sold if the contract includes a charge for the item. Items to which this requirement applies include service contracts, insurance products, debt cancellation agreements, theft deterrent devices, surface protection products, and vehicle contract cancellation option agreements. (C.C. 2982.2(a)(1).)
- (2) The sum of all charges disclosed under C.C. 2982.2(a), labeled "total." (C.C. 2982.2(a)(2).)
- (3) The amount that would be calculated under the contract as the regular installment payment if charges for the items disclosed under C.C. 2982.2(a) are not included in the contract. This amount must be labeled "Installment Payment EXCLUDING Listed Items." (C.C. 2982.2(a)(3).)
- (4) The amount that would be calculated under the contract as the regular installment payment if charges for the items disclosed under C.C. 2982.2(a) are included in the contract. This amount must be labeled "Installment Payment INCLUDING Listed Items." (C.C. 2982.2(a)(4).)

C.C. 2982.2 does not apply to the sale of a motorcycle or an off-highway vehicle. (C.C. 2982.2(c).)

SUPPLEMENT: [This section is current through the latest supplement]



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 - cc. Warning Notices to Buyers.

4 Witkin Sum. Cal. Law Sales § 243

[§ 243] Warning Notices to Buyers.

(1) *General Warning.* Under C.C. 2982(g)(1), where the contract includes a finance charge determined on the precomputed basis, and provides that the unearned portion of the finance charge to be refunded upon full prepayment of the contract is to be determined by a method other than actuarial, the contract must contain (in at least 10-point boldface type if the contract is printed) a *general warning* of the buyer's rights and liabilities:

"Notice to buyer: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in. (2) You are entitled to a completely filled-in copy of this agreement. (3) You can prepay the full amount due under this agreement at any time and obtain a partial refund of the finance charge if it is \$ 1 or more. Because of the way the amount of this refund will be figured, the time when you prepay could increase the ultimate cost of credit under this agreement. (4) If you default in the performance of your obligations under this agreement, the vehicle may be repossessed and you may be subject to suit and liability for the unpaid indebtedness evidenced by this agreement."

Where the finance charge is determined on the precomputed basis and provides for the actuarial method for computing the unearned portion of the finance charge upon prepayment in full, the notice is the same as set out above, with the exception that the third provision of the notice need not contain a warning that the time of prepayment can increase the ultimate cost of credit. (C.C. 2982(g)(2).)

Where the finance charge is determined on the simple-interest basis, the notice is also the same as set out above, except that the third provision of the notice must state only that the full amount due under the agreement can be prepaid at any time. (C.C. 2982(g)(3).)

(2) *Unfair or Deceptive Practices.* C.C. 2982(h) requires the following notice, which must be in at least 8-point boldface type and acknowledged by the buyer:

"If you have a complaint concerning this sale, you should try to resolve it with the seller."

"Complaints concerning unfair or deceptive practices or methods by the seller may be referred to the city attorney, the district attorney, or an investigator for the Department of Motor Vehicles, or any combination thereof."

"After this contract is signed, the seller may not change the financing or payment terms unless you agree in writing to the change. You do not have to agree to any change, and it is an unfair or deceptive practice for the seller to make a unilateral change." "Buyer's Signature"

(3) *Insurance Coverage*. C.C. 2984.1 requires a specific warning on *insurance coverage*. The statement must be in contrasting red print (in 8-point bold type if printed), must be signed or initialed by the buyer, and must satisfy the requirements of *Veh.C. 5604* as follows: THE MINIMUM PUBLIC LIABILITY INSURANCE LIMITS PROVIDED IN LAW MUST BE MET BY EVERY PERSON WHO PURCHASES A VEHICLE. IF YOU ARE UNSURE WHETHER OR NOT YOUR CURRENT INSURANCE POLICY WILL COVER YOUR NEWLY ACQUIRED VEHICLE IN THE EVENT OF AN ACCIDENT, YOU SHOULD CONTACT YOUR INSURANCE AGENT. WARNING: YOUR PRESENT POLICY MAY NOT COVER COLLISION DAMAGE OR MAY NOT PROVIDE FOR FULL REPLACEMENT COSTS FOR THE VEHICLE BEING PURCHASED. IF YOU DO NOT HAVE FULL COVERAGE, SUPPLEMENTAL COVERAGE FOR COLLISION DAMAGE MAY BE AVAILABLE TO YOU THROUGH YOUR INSURANCE AGENT OR THROUGH THE SELLING DEALER. HOWEVER, UNLESS OTHERWISE SPECIFIED, THE COVERAGE YOU OBTAIN THROUGH THE DEALER PROTECTS ONLY THE DEALER, USUALLY UP TO THE AMOUNT OF THE UNPAID BALANCE REMAINING AFTER THE VEHICLE HAS BEEN REPOSSESSED AND SOLD. FOR ADVICE ON FULL COVERAGE THAT WILL PROTECT YOU IN THE EVENT OF LOSS OR DAMAGE TO YOUR VEHICLE, YOU SHOULD CONTACT YOUR INSURANCE AGENT. THE BUYER SHALL SIGN TO ACKNOWLEDGE THAT HE/SHE UNDERSTANDS THESE PUBLIC LIABILITY TERMS AND CONDITIONS. S/S .

C.C. 2984.1 also prohibits the printing of any form for use as a conditional sale contract form that does not comply with these requirements. (On *Veh.C. 5604*, see 6 *Summary* (10th), *Torts*, §1077; on effect of violation of C.C. 2984.1, see *Dana v. Sutton Motor Sales* (1961) 56 C.2d 284, 287, 14 C.R. 649, 363 P.2d 881.)

(4) *No Cooling Off Period*. C.C. 2982(r) requires that the contract contain the following notice, with a heading in at least 12-point bold type and the text in at least 10-point bold type, circumscribed by a line, immediately above the contract signature line:

"There Is No Cooling Off Period"

"California law does not provide for a 'cooling off' or other cancellation period for vehicle sales. Therefore, you cannot later cancel this contract simply because you change your mind, decide the vehicle costs too much, or wish you had acquired a different vehicle. After you sign below, you may only cancel this contract with the agreement of the seller or for legal cause, such as fraud."

Motor vehicle dealers are required to display a notice at their place of business indicating that there is no cooling off period. (*Veh.C. 11709.2*.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *No Cooling Off Period*. C.C. 2982(r) was amended in 2005 to change the heading to read "THERE IS NO COOLING-OFF PERIOD UNLESS YOU OBTAIN A CONTRACT CANCELLATION OPTION." The 2005 amendment also added an additional paragraph to the statutory warning, the language of which was further amended in 2006:

"However, California law does require a seller to offer a 2-day contract cancellation option on used vehicles with a purchase price of less than \$ 40,000, subject to certain statutory conditions. This contract cancellation option requirement does not apply to the sale of a recreational vehicle, a motorcycle, or an off-highway motor vehicle subject

to identification under California law. See the vehicle contract cancellation option agreement for details." (On used vehicle contract cancellation options, see Supp., *infra*, §396B.)



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- 2. Copy to Buyer and Retention by Seller.

4 Witkin Sum. Cal. Law Sales § 244

[§ 244] Copy to Buyer and Retention by Seller.

(1) *Requirement of Delivery.* The seller must furnish the buyer with an "exact copy" of the conditional sale contract or purchase order at the time the contract or order is signed. (C.C. 2981.9; on purchase order, see *supra*, §240.) No motor vehicle can be delivered until the seller delivers a "fully executed copy" of the contract or order, along with "any vehicle purchase proposal and any credit statement which the seller has required or requested the buyer to sign and which he or she has signed during the contract negotiations." (C.C. 2981.9.)

(2) *Acknowledgment of Delivery.* An acknowledgment by the buyer that he or she has received a copy of the contract or purchase order, and any executed purchase proposal or credit statement, must be in conspicuous writing or printing (equal to 10-point boldface type). If the acknowledgment is contained in the contract, it must appear directly above the buyer's signature, or adjacent to any other notices required by law to be placed immediately above the signature space. Such an acknowledgment raises a rebuttable presumption of delivery in any action or proceeding by or against a third party lacking knowledge to the contrary when the third party acquired his or her interest in the contract. Where the third party sends the buyer a copy of the documents, or a notice containing the required disclosures and stating that the buyer must notify the third party of lack of a copy of the documents within 30 days, and the buyer does not so notify the third party, the presumption of delivery is conclusive. (C.C. 2984.3; see *10 U.C.L.A. L. Rev. 140.*)

(3) *Retention of Copy by Seller.* The seller must retain a copy of the contract and related documents for at least 7 years or the length of the contract, whichever is longer. Violation of a court order to produce any of these documents may result in imposition of a civil penalty of \$ 5,000. (C.C. 2984.5.)

West's Key Number Digest, Sales k.1.5

SUPPLEMENT: [This section is current through the latest supplement]



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 - 3. Limitation of Charges.

4 Witkin Sum. Cal. Law Sales § 245

[§ 245] Limitation of Charges.

(1) *In General.* C.C. 2982(j)(1) provides that, except where the finance charge, or a portion of it, is determined by the simple-interest basis and the "amount financed" (see supra, §242) is more than \$ 2,500, the dollar amount of the disclosed *finance charge* may not exceed the greater of:

"(A)(i) One and one-half percent on so much of the unpaid balance as does not exceed two hundred twenty-five dollars (\$ 225), 1 1/6 percent on so much of the unpaid balance in excess of two hundred twenty-five dollars (\$ 225) as does not exceed nine hundred dollars (\$ 900) and five-sixths of 1 percent on so much of the unpaid balance in excess of nine hundred dollars (\$ 900) as does not exceed two thousand five hundred dollars (\$ 2,500); or-

(ii) One percent of the entire unpaid balance; multiplied in either case by the number of months (computed on the basis of a full month for any fractional month period in excess of 15 days) elapsing between the date of the contract and the due date of the last installment; or

(B) If the finance charge is determined by the precomputed basis, twenty-five dollars (\$ 25); or

(C) If the finance charge or a portion thereof is determined by the simple-interest basis:

(i) Twenty-five dollars (\$ 25) if the unpaid balance does not exceed one thousand dollars (\$ 1,000).

(ii) Fifty dollars (\$ 50) if the unpaid balance exceeds one thousand dollars (\$ 1,000) but does not exceed two thousand dollars (\$ 2,000).

(iii) Seventy-five dollars (\$ 75) if the unpaid balance exceeds two thousand dollars (\$ 2,000)."

"Simple-interest basis" is defined as applying a constant rate to the unpaid balance as it changes, calculated either on a 365-day year, or, for contracts entered into before January 1, 1988, on a 360-day year. (C.C. 2981(n).)
"Precomputed basis" is defined as "multiplying the original unpaid balance of the contract by a rate and multiplying that product by the number of payment periods elapsing between the date of the contract and the date of the last scheduled

payment." (C.C. 2981(o).) No contract may use both methods, except one for insurance charges added after execution of the contract under C.C. 2982.8(a) or one for repair or preservation charges under C.C. 2982.8(d). (C.C. 2981.8.)

(2) *Additional and Administrative Charges.* There are limited circumstances under which the holder of the contract may charge, collect, or receive a finance charge that exceeds the disclosed finance charge. (C.C. 2982(j)(2).) Further, in the event the finance charge is determined in whole or in part by the simple-interest basis, and the unpaid balance exceeds \$ 5,000, the holder may, in lieu of the minimum finance charge under C.C. 2982(j)(1)(C), supra, charge, receive, or collect on the date of the contract an administrative finance charge not greater than \$ 75. (C.C. 2982(j)(3) [sum of administrative finance charge and portion of finance charge determined by simple-interest basis must not exceed maximum total finance charge permitted by C.C. 2982(j)(1)(A)].)

(3) *Unequal or Irregular Payments.* When a contract provides for unequal or irregular payments, or payments on other than a monthly basis, the maximum finance charge permitted is at the effective rate provided for in C.C. 2982(j)(1), supra, having due regard for the schedule of installments. (C.C. 2982(j)(4); see 17 *Pacific L. J.* 655.)

(4) *Long-Term Contracts.* Contracts entered into on or after January 1, 1983, must provide for calculation of the finance charge on the simple-interest basis if the final installment due, under the original contract, is more than 62 months after the date of the contract. (C.C. 2981.7.) (See 11 *Pacific L. J.* 396.)

(5) *Delinquency Charges.* A delinquency charge may be made only on a default of at least 10 days, and only one delinquency charge may be collected on any one installment. The charge cannot exceed 5% of the installment, but the contract may provide for reasonable collection costs and fees in the event of delinquency. Payments timely received by the seller under an extension or deferral agreement are not subject to a delinquency charge, unless the charge is permitted by C.C. 2982.3, infra, this section. (C.C. 2982(k).)

(6) *Extensions and Deferrals.* C.C. 2982.3 permits extension of the scheduled due date or deferral of the scheduled payment of any or all installments, and, if the agreement for such extension or deferral is in writing and signed by the parties, allows finance charges on the extension or deferral of (a) up to one percent per month simple interest on the amount extended or deferred for the period of extension or deferral (where contractual finance charge is determined on precomputed basis) or (b) the lesser of \$ 25 or 10% of the then outstanding principal balance of the contract (where contractual finance charge is determined on simple-interest basis).

However, the seller or holder may, in an attempt to collect delinquent installments, advise the obligor, *either orally or in writing*, that the due date for one or more installments will be extended without charge, other than any applicable late charge provided for in the contract. (C.C. 2982.3.) (On extension of time for payment by National Guard member in active service, see 1 *Summary* (10th), *Contracts*, §764.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* C.C. 2982(j)(1) was amended in 2005 to replace the "; or" at the end of C.C. 2982(j)(1)(A)(i), C.C. 2982(j)(1)(A)(ii), and C.C. 2982(j)(1)(B), with periods.



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4 Witkin Sum. Cal. Law Sales § 246

[§ 246] Right To Rescind If Financing Unavailable.

C.C. 2982.9 provides that if the contract is conditioned upon third-party financing that the seller knows the buyer intends to obtain independently, and the buyer cannot do so, the contract "shall be deemed rescinded" and all consideration must be "returned by the respective parties without demand."

SUPPLEMENT: [This section is current through the latest supplement]



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- 5. Assignment by Seller.

4 Witkin Sum. Cal. Law Sales § 247

[§ 247] Assignment by Seller.

Prior to the 1971 revision of C.C. 2983.5, if the seller assigned his or her rights in the contract, the buyer had to give written notice to the assignee of any claim or defense arising out of the contract within 15 days after receiving notice of the assignment, or the buyer's rights, with certain exceptions, would be cut off. (See *Hughes v. Nashua Mfg. Co.* (1968) 257 C.A.2d 778, 782, 65 C.R. 380; 10 U.C.L.A. L. Rev. 151.)

In 1971, C.C. 2983.5 was amended to subject an assignee to all equities and defenses the buyer had against the seller *at the time of the assignment*. (See 7 U.S.F. L. Rev. 130.) In 1975, however, the statute was further amended to extend the liability of the assignee under assignments made on or after January 1, 1976, as follows:

(1) The assignee is subject to equities and defenses even though they were not in existence at the time of the assignment. (C.C. 2983.5(a).)

(2) The assignee's liability may not exceed the amount of the debt owing to the assignee at the time of the assignment. (C.C. 2983.5(a).)

(3) The buyer's right to assert equities and defenses cannot be waived. (C.C. 2983.5(a).)

(4) The assignee has recourse against the seller to the extent of any liability incurred, regardless of a statement that the assignment was without recourse. (C.C. 2983.5(b).) (See 7 *Pacific L. J.* 273; for similar amendments to C.C. 1804.2 (retail installment contracts), see *infra*, §281.)

West's Key Number Digest, Sales k.1.5

SUPPLEMENT: [This section is current through the latest supplement]

C.C. 2982.10(a), added in 2005, prohibits a seller, in consideration of an assignment of a conditional sale contract, from accepting or receiving from an assignee any payment or credit based on an amount collected or received, or to be collected or received under the contract as a finance charge, except to the extent the payment or credit falls below a

specified amount.

C.C. 2982.10(b) provides that C.C. 2982.10(a) does not apply where:

(1) The assignment is with full recourse, or under other terms requiring the seller to bear the entire risk of the buyer's financial performance.

(2) The assignment is more than 6 months after the date of the conditional sale contract.

(3) There are isolated instances resulting from bona fide errors that would otherwise constitute a violation of C.C. 2982.10(a), if the seller maintains reasonable procedures to guard against errors and, upon notice of an error, promptly remits to the assignee any consideration exceeding the permitted amount.

(4) The assignment is of a conditional sale contract involving a motorcycle.

(5) The assignment is of a conditional sale contract involving specified off-highway motor vehicles.



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- 6. Refund of Payment or Insurance.

4 Witkin Sum. Cal. Law Sales § 248

[§ 248] Refund of Payment or Insurance.

(1) *Payment.* Any payment made by the buyer pending execution of the contract must be refunded if the contract is not executed. (C.C. 2982.7(a).) Where a vehicle left as a downpayment is not returned to the buyer by a seller who has breached the contract, the buyer is entitled to recover, within 5 business days after the seller's breach, the greater of the vehicle's fair market value or its value as stated in the contract or purchase order. (C.C. 2982.7(b); see C.C. 2982.7(c) [buyer's remedies under C.C. 2982.7(b) are nonexclusive and cumulative].)

(2) *Insurance.* If an insurance policy covering the buyer's vehicle is assigned to the seller as part of a trade-in, the seller must refund to the buyer (or credit the buyer on the next installment) the amount realized on the policy. (B. & P.C. 18450.) Violation of these provisions is a misdemeanor (B. & P.C. 18450), and the buyer may bring a civil action for treble damages (B. & P.C. 18451).

SUPPLEMENT: [This section is current through the latest supplement]



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- 7. Right To Pay Before Maturity.

4 Witkin Sum. Cal. Law Sales § 249

[§ 249] Right To Pay Before Maturity.

Notwithstanding any contrary provision in the contract, the buyer may pay the balance in full "at any time before maturity." (C.C. 2982(l).) When the finance charges are determined on the precomputed basis, the buyer must pay the outstanding contract balance, but is entitled to a refund credit in the amount of the unearned portion of the finance charges, as specified. (C.C. 2982(l)(1).) If the simple-interest method is used, the buyer must pay the outstanding balance plus the earned finance charges, as specified. (C.C. 2982(l)(2).) If the minimum finance charge specified in C.C. 2982(j) (see supra, §245) exceeds the earned finance charge, the holder is entitled to the difference. (C.C. 2982(l)(3).) Delinquency charges authorized by C.C. 2982(k) may also be collected. (C.C. 2982(l)(4).) Whenever the indebtedness is satisfied prior to maturity through surrender or repossession of the motor vehicle, by redemption of it after repossession, or by judgment, the buyer's outstanding obligation is determined by C.C. 2982(l)(1) and C.C. 2982(l)(2). The obligation is determined as of (1) the date the holder recovers the value of the motor vehicle or (2) the date the holder, after electing to keep the vehicle in satisfaction of the buyer's indebtedness, takes possession. (C.C. 2982(l)(5).) (On the law prior to 1961, which did not authorize refund on repossession and resale, see *Imperial Thrift & Loan v. Ferguson* (1957) 155 C.A.2d Supp. 866, 868, 318 P.2d 566.)

SUPPLEMENT: [This section is current through the latest supplement]



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 - 8. Notice of Intent To Sell.

4 Witkin Sum. Cal. Law Sales § 250

[§ 250] Notice of Intent To Sell.

Notwithstanding any contrary provision in the contract, the seller who intends to resell after repossession must give 15 days' written notice (which may be personally served or sent by certified or first-class mail) to all persons liable on the contract. The period is extended to 20 days if either the place of mailing or the place of address is outside the state. During this period and before sale, those persons "have a right to redeem the motor vehicle by paying in full the indebtedness evidenced by the contract." (C.C. 2983.2(a)(1); see *10 U.C.L.A. L. Rev. 154*; *13 U.C.L.A. L. Rev. 354*; on repossession and resale in other jurisdictions, see *22 Stanf. L. Rev. 20*.)

Notice of the time and place of the sale is not required. (See *Creditors Bureau v. De La Torre* (1971) *16 C.A.3d 558, 562, 94 C.R. 145*.)

West's Key Number Digest, Sales k.1.5

SUPPLEMENT: [This section is current through the latest supplement]

A notice of intent to sell must inform the consumer of any amounts the consumer will have to pay to the creditor or a third party in order to reinstate the contract. The notice "must also inform the consumer if, when, and by how much those amounts may increase as a result of additional payments coming due, or as a result of late fees or other fees and charges. In other words, creditors must provide consumers with sufficient information to allow consumers to fulfill all of the conditions the consumer must meet before a creditor will reinstate the contract." (*Juarez v. Arcadia Financial, Ltd.* (2007) *152 C.A.4th 889, 912, 61 C.R.3d 382* [finance company's notice, which did not inform buyers of dollar amounts necessary to reinstate their contracts, was inadequate; C.C. 2983.2 requires disclosure of "all the conditions precedent," without specifying that dollar amounts must be disclosed, because Legislature wanted to cover every type of requirement that must be met].)



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 - 9. Notice to Cosigner.

4 Witkin Sum. Cal. Law Sales § 251

[§ 251] Notice to Cosigner.

If, as a condition of granting credit, a cosigner was required, the "creditor" or "holder" must give the cosigner written notice of delinquency before repossessing the motor vehicle under the "motor vehicle credit agreement." (C.C. 2983.35(a); for definitions of "creditor," "holder," and "motor vehicle credit agreement," see C.C. 2983.35(d).) A creditor or holder who fails to comply with this requirement may not recover from the cosigner any costs associated with the repossession. (C.C. 2983.35(b).) The statute is applicable notwithstanding C.C. 2982.5 (*supra*, §240). (C.C. 2983.35(c).)

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 - 10. Deficiency Judgment.
 - aa. In General.

4 Witkin Sum. Cal. Law Sales § 252

[§ 252] In General.

(1) *Notice of Intent To Sell.* C.C. 2983.2(a) provides that persons liable on the contract will be liable for a deficiency after sale only if the *notice of intent to sell* (see supra, §250) has been given *within 60 days of repossession* and, in addition:

(a) Specifies that the right to redeem exists for 15 days from the date of giving or mailing the notice, provides an itemization of the contract balance and of any delinquency, collection, or repossession costs and fees, and sets forth the computation or estimate of the amount of any credit for unearned finance charges or cancelled insurance as of the date of the notice.

(b) States either that there is a conditional right to reinstate the contract within the 15-day period or that there is no such right (with an explanation therefor).

(c) States that, upon written request, the redemption period, and the reinstatement period if applicable, will be extended for an additional 10 days (proper forms and instructions to be provided by the seller or holder).

(d) Discloses the place at which the motor vehicle will be returned upon redemption or reinstatement.

(e) Designates the name and address of the person or office to whom payment must be made.

(f) States that the seller or holder will dispose of the vehicle upon expiration of the 15-day period (20 days if either the place of mailing or the place of address is outside the state) and that, if a request to extend the redemption or reinstatement has been made, such extension will be made without further notice.

(g) Informs persons liable on the contract that, upon written request (with specified mailing instructions), such persons will be furnished a written accounting regarding the disposition of the vehicle (the contents of the accounting are listed in C.C. 2983.2(b)).

(h) Includes the following notice in at least 10-point boldface type if printed: "NOTICE. YOU MAY BE SUBJECT TO SUIT AND LIABILITY IF THE AMOUNT OBTAINED UPON DISPOSITION OF THE VEHICLE IS INSUFFICIENT TO PAY THE CONTRACT BALANCE AND ANY OTHER AMOUNTS DUE."

(i) Informs persons liable on the contract that, on disposition of the motor vehicle, they will be liable for the deficiency balance, plus interest at the contract rate, or at the legal rate of interest under C.C. 3289 if there is no contract rate of interest, from the date of disposition to the date of entry of judgment. (C.C. 2983.2(a) further specifies that a court retains discretion to strike out an unconscionable rate of interest.) (See *Eldorado Bank v. Lytle* (1983) 147 C.A.3d Supp. 17, 19, 21, 195 C.R. 499 [bank not entitled to deficiency where it failed to comply with C.C. 2983.2]; for a study and criticism of the practice of obtaining deficiency judgments in automobile sales, see 27 *Stanf. L. Rev.* 1081.)

According to C.C. 2983.2(d), C.C. 2983.2 does not apply to loans made by lenders licensed under *Fin.C. 22000* et seq. (Personal Property Brokers Law) or *Fin.C. 24000* et seq. (California Small Loan Law). Those laws were repealed in 1994 and replaced by the California Finance Lenders Law (*Fin.C. 22000* et seq.), and any reference to the former laws, such as the reference in C.C. 2983.2(d), is deemed a reference to the new law. (Stats. 1994, Chap. 1115, §9.)

Where the contract is negotiated primarily in the Spanish language, C.C. 1632 requires that a Spanish language translation of the deficiency notice be provided. (*Reyes v. Superior Court* (1981) 118 C.A.3d 159, 162, 173 C.R. 267.) The scope of C.C. 1632 was extended in 2003 to Chinese, Tagalog, Vietnamese, and Korean. (See 1 *Summary* (10th), *Contracts*, §124.)

(2) *Buyer's Action for Conversion Where Notice Inadequate.* In addition to being unable to collect a deficiency, a reposessing seller who fails to provide proper notice under C.C. 2983.2 may be sued for conversion. In *Cerra v. Blackstone* (1985) 172 C.A.3d 604, 218 C.R. 15, the court pointed out that C.C. 2983.3 gives a defaulting purchaser an opportunity to reinstate the contract, and C.C. 2983.2 provides for notice detailing the purchaser's rights and the sum necessary to cure his or her default. Neither statute states that a seller may omit giving the required notice, or deny the right of reinstatement, and suffer only the penalty of losing the right to a deficiency judgment. "Such an interpretation could lead to unreasonable and unfair results. We would not venture a guess how often a purchaser makes a large down payment, but in such an event, a conditional seller could reposess and be made whole even in the absence of a deficiency judgment. In many other cases, the collection of a deficiency judgment is out of the question as a practical matter. If depriving the seller of a deficiency were the consumer's only remedy, the statutory purpose above stated [providing comprehensive protection for unsophisticated motor vehicle consumers] would be frustrated as the dealer would have no incentive to comply." (172 C.A.3d 608, 609.)

SUPPLEMENT: [This section is current through the latest supplement]



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 - c. Regulatory Provisions.
 - 10. Deficiency Judgment.
 - bb. Exceptions: Mobilehome or Motor Vehicle.

4 Witkin Sum. Cal. Law Sales § 253

[§ 253] Exceptions: Mobilehome or Motor Vehicle.

(1) *Mobilehomes*. Notwithstanding C.C. 2983.2 (supra, §252) or any other provision of law, a deficiency judgment will not lie in the case of contracts entered into on or after March 7, 1973, and before July 1, 1981, after any sale of any mobilehome for which a permit is required pursuant to *Veh.C. 35780* or *35790*, in the event the purchaser fails to complete his or her conditional sale contract. (C.C. 2983.8(a) [restriction inapplicable where there is substantial damage to the mobilehome other than wear and tear from normal use].)

In *Bank of Sonoma County v. Dorries* (1986) 185 C.A.3d 1291, 230 C.R. 459, plaintiff bank sued defendant, who purchased a mobilehome in November 1980, for the balance due on a purchase money security agreement that had been assigned to plaintiff. The agreement provided that in the event defendant defaulted on his installment payments, plaintiff could either obtain a judgment for the balance owed, or repossess and sell the mobilehome. Plaintiff made no attempt to foreclose on the security, and defendant raised C.C. 2983.8, supra, as an affirmative defense. The trial court rejected the defense and granted plaintiff's motion for summary judgment. *Held*, reversed. C.C. 2983.8 bars a money judgment under a mobilehome purchase money agreement. Thus, plaintiff could not waive the security and sue for the balance due; its remedy was repossession of the mobilehome. (185 C.A.3d 1294.) C.C. 2983.8 was apparently patterned after C.C.P. 580b, the anti-deficiency statute that applies to real property (see 4 Summary (10th), *Security Transactions in Real Property*, §182 et seq.), and was intended "to avoid saddling people who encounter such economic adversity as to cause them to lose their homes with the financial hardship of continuing to make payments on a mobilehome in which they no longer live." (185 C.A.3d 1293.)

(2) *Motor Vehicles*. Notwithstanding C.C. 2983.2 or any other provision of law, a deficiency judgment will not lie after any sale or other disposition of a motor vehicle unless the court has determined that the sale or other disposition was in conformity with C.C. 2981 et seq. and the relevant provisions of U.C.C. 9101 et seq., including U.C.C. 9610, 9611, 9612, 9614, 9615, and 9626. (C.C. 2983.8(b), adding that determination may be made upon affidavit unless court requires hearing.) (See *Bank of America v. Lallana* (1998) 19 C.4th 203, 206, 207, 77 C.R.2d 910, 960 P.2d 1133 [creditor was precluded from obtaining deficiency judgment where it violated former U.C.C. 9504(3) (now U.C.C. 9610, 9611) by notifying debtor it would hold private sale to dispose of repossessed car and then holding public sale

without giving proper notice of public sale].)

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- d. Prohibited Terms or Acts.

4 Witkin Sum. Cal. Law Sales § 254

[§ 254] Prohibited Terms or Acts.

(1) *In General.* C.C. 2983.7 lists a number of provisions that cannot lawfully be included in the contract:

- (a) The buyer agrees not to assert against the seller or seller's assignee "a claim or defense arising out of the sale."
- (b) A power of attorney to confess judgment in this state.
- (c) An assignment of wages (except by separate instrument under *Lab.C. 300, 1 Summary* (10th), *Contracts*, §724).
- (d) The buyer waives a right of action against the seller or holder of the contract or other person acting in his or her behalf "for any illegal act" committed in collection of payments or in repossession.
- (e) A power of attorney appointing the seller or holder of the contract or other person acting in his or her behalf "as the buyer's agent" in collection of payments or in repossession.
- (f) The buyer relieves the seller from "liability for any legal remedies" which the buyer may have under the contract or any separate instrument executed in connection therewith.
- (g) A provision for venue in an action by the seller or holder of the contract, giving the right to sue in a county other than the county where (1) the contract was signed by the buyer, (2) the buyer resides at commencement of the action, (3) the buyer resides at the time the contract was made, or (4) the vehicle is permanently garaged.

(2) *Additional Security Invalid.* C.C. 2984.2 provides that the contract, and any *agreement* between the seller and buyer made in connection with the contract, cannot provide for title to or a lien on any property other than the following:

- (a) The motor vehicle and its accessories, accessions, replacements or proceeds (C.C. 2984.2(a)(1));
- (b) The proceeds of any insurance policies covering the motor vehicle which are required by the seller, or the returned premiums if the premiums for the policies are included in the amount financed (C.C. 2984.2(a)(2));

(c) The proceeds of any credit insurance policies purchased by the buyer in connection with the motor vehicle conditional sale contract, or the returned premiums if the premiums for the policies are included in the amount financed (C.C. 2984.2(a)(3));

(d) The proceeds and returned price of any service contract whose cost is included in the amount financed (C.C. 2984.2(a)(4)). (See *Thomas v. Wright* (1971) 21 C.A.3d 921, 924, 98 C.R. 874 [decided under former statute; trust deed taken as security for "automobile leasing contract" held unenforceable].)

The restrictions of C.C. 2984.2(a) do not apply to (a) any agreement which meets the requirements of C.C. 2982.5 (see *supra*, §240) and otherwise complies with the Act, nor (b) with respect to mobilehome sales made prior to July 1, 1981, any agreement conveying a security interest in real property on which the mobilehome is installed on a foundation system pursuant to *Health & Saf.C. 18551*. (C.C. 2984.2(b).)

Any provision in violation of C.C. 2984.2 is void. (C.C. 2984.2(c).)

(3) *No Acceleration or Repossession Without Default*. C.C. 2983.3(a) expressly prohibits any provision permitting the seller or holder of the contract to repossess the vehicle or to accelerate maturity of all or any part of the amount due in the absence of the buyer's default. (On right to reinstate contract after default, and seller's or holder's right to accelerate maturity prior to expiration of right to reinstate, see C.C. 2983.3(b)-(e).)

According to C.C. 2983.3(f), C.C. 2983.3 does not apply to loans made by lenders licensed under *Fin.C. 22000* et seq. (Personal Property Brokers Law) or *Fin.C. 24000* et seq. (California Small Loan Law). Those laws were repealed in 1994 and replaced by the California Finance Lenders Law (*Fin.C. 22000* et seq.), and any reference to them, such as the reference in C.C. 2983.3(f), is deemed a reference to the new law. (Stats. 1994, Chap. 1115, §9.)

(4) *No Discount for Assistance in Sales*. It is unlawful for the seller to offer the inducement of a rebate, discount, commission, or other consideration to the buyer for selling or giving information or assistance leading to a sale of the same or related goods. (C.C. 2982.1.)

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 - 1. In General.

4 Witkin Sum. Cal. Law Sales § 255

[§ 255] In General.

Under former law, the buyer had certain remedies for violation of the basic or substantive requirements of former C.C. 2982(c) (limitation on finance charges) and former C.C. 2982(d) (refund credit for prepayment). Separate remedies were provided for noncompliance with the formal requisites of former C.C. 2982(a) and (b). (See generally *10 U.C.L.A. L. Rev.* 142; on violations of former C.C. 2982(c), (d), see *Lewis v. Muntz Car Co. of Calif.* (1958) 50 C.2d 681, 685, 328 P.2d 968; *General Motors Acceptance Corp. v. Kyle* (1960) 54 C.2d 101, 4 C.R. 496, 351 P.2d 768; 39 Cal. L. Rev. 453; 23 So. Cal. L. Rev. 39; 6 U.C.L.A. L. Rev. 480; on violations of former C.C. 2982(a), (b), see *Carter v. Seaboard Finance Co.* (1949) 33 C.2d 564, 573, 203 P.2d 758; *Estrada v. Alvarez* (1952) 38 C.2d 386, 388, 240 P.2d 278; *City Lincoln-Mercury Co. v. Lindsey* (1959) 52 C.2d 267, 273, 339 P.2d 851; *General Motors Acceptance Corp. v. Kyle*, *supra*; *Baum v. Aleman* (1956) 139 C.A.2d Supp. 929, 932, 293 P.2d 162; *Williams v. Caruso Enterprises* (1956) 140 C.A.2d Supp. 973, 975, 295 P.2d 592; *Bratta v. Caruso Car Co.* (1958) 166 C.A.2d 661, 333 P.2d 807; 39 Cal. L. Rev. 451; 12 *Hastings L. J.* 359 [*City Lincoln-Mercury Co.*].)

The Rees-Levering Act realigns the buyer's remedies. The remedies specified for violations of C.C. 2982(a) and (j) (former C.C. 2982(c)) are the same. (See *infra*, §256.) Violations of C.C. 2982(l) (former C.C. 2982(d)) are treated separately. (See *infra*, §257.) (See generally *10 U.C.L.A. L. Rev.* 142, 150.)

A provision outside the Rees-Levering Act restricts the remedies of the *seller*. A person acting as a motor vehicle dealer or lessor-retailer who was not appropriately licensed at the time of the sale or lease may not enforce a security interest against the buyer or recover money, property, or other relief. (*Veh.C.* 11711.3.)

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e. Effect of Noncompliance.

2. Violation of Contractual Requirements or Finance Provisions.

4 Witkin Sum. Cal. Law Sales § 256

[§ 256] Violation of Contractual Requirements or Finance Provisions.

(1) *Effect of Violation.* Violation of C.C. 2981.9 and 2982(a), requiring writing, delivery, and recitals, C.C. 2982(j), limiting the amount of the finance charge, or C.C. 2982(k), governing delinquency charges, ordinarily has the following effects: (a) The contract is not enforceable; (b) the buyer may recover the total amount paid, including the value of a trade-in; (c) the buyer may elect to affirm or rescind. (C.C. 2983, 2983.1; on election, see *infra*, this section.) But an exception is made for violation "as the result of an accidental or bona fide error in computation." (C.C. 2983; see 10 U.C.L.A. L. Rev. 146.)

A wilful violation of these provisions is a misdemeanor. (C.C. 2983.6.)

(2) *Recovery of Value of Trade-in.* Under the original wording of C.C. 2983, the buyer's recovery of the value of a trade-in was limited to the agreed cash value as it appeared in the contract. A dealer, by offering a large discount on the car sold with a corresponding low value for the trade-in, could save the buyer some sales tax but at the same time unfairly limit the buyer's recovery in the event of a suit. A 1967 amendment remedied the situation by allowing the buyer to recover either the agreed cash value "or the fair market value ... as of the time the contract is made, whichever is greater."

(3) *Rights of Holder Without Knowledge of Violation.* If a contract is acquired by a holder without "actual knowledge" of the seller's violation, the contract is enforceable. But the buyer is excused from payment of the unpaid finance charge. (C.C. 2983.1; see 10 U.C.L.A. L. Rev. 148.)

(4) *Rights of Holder With Knowledge of Violation.* If the contract is acquired by a holder with knowledge of the violation, the contract is unenforceable "except by a bona fide purchaser, assignee or pledgee for value." (C.C. 2983.1.) Presumably, the statute refers to enforceability by a *subsequent* taker, since a holder with knowledge cannot be a bona fide purchaser. (See 10 U.C.L.A. L. Rev. 147.)

(5) *Election To Affirm or Rescind.* If the contract is unenforceable under either C.C. 2983 or 2983.1, "the buyer may elect to retain the motor vehicle and continue the contract in force or may, with reasonable diligence, elect to

rescind the contract and return the motor vehicle. The value of the motor vehicle so returned shall be credited as restitution by the buyer without any decrease which results from the passage of time in the cash price of the motor vehicle as such price appears on the conditional sale contract." (C.C. 2983.1.) (On necessity of restoring vehicle as condition of recovery of all payments made, see *Katsaros v. O.E. Saugstad Co.* (1961) 197 C.A.2d 745, 749, 17 C.R. 453.)

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4 Witkin Sum. Cal. Law Sales § 257

[§ 257] Violation of Provisions for Prepayment of Balance.

If the seller or the holder of the contract violates C.C. 2982(l), the provision allowing the buyer to pay the balance at any time, the buyer may recover three times the amount of any finance charge paid. An exception is made for violation "as the result of an accidental or bona fide error of computation." (C.C. 2983.1; see *10 U.C.L.A. L. Rev.* 150.)

A wilful violation of these provisions is a misdemeanor. (C.C. 2983.6.)

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4. Substantial Compliance and Technical Violations.

4 Witkin Sum. Cal. Law Sales § 258

[§ 258] Substantial Compliance and Technical Violations.

In *Stasher v. Harger-Haldeman* (1962) 58 C.2d 23, 22 C.R. 657, 372 P.2d 649, decided under the former law, plaintiff, after 63,000 miles and over 21/2 years' use, sought to rescind and recover all payments made. The trial judge found that all the challenges were technical, that defendant had substantially complied with the statute, and that plaintiff had not been damaged. In affirming, the court declared that "mere technical imperfections of form or variations in mode of expression by the seller ... should not be given the stature of noncompliance and thereby transformed into a windfall for an unscrupulous and designing buyer." (58 C.2d 29.) And, after admonishing dealers to exercise care in preparation of contracts to meet the exacting demands of the statute, the court added: "We understand the burden imposed on these businessmen, as well as the basis for the law, and we understand also that in some of their relationships with customers--or pretending customers--it will be the dealer rather than the customer who needs protection. ... When appropriate facts are shown courts should be equally as alert to protect the one party to a contract as the other." (58 C.2d 34.)

Since the technical violations in the *Stasher* case, *supra*, were not deemed to be a noncompliance, it should follow that such violations will not require corrections under the present statute (see *infra*, §259).

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 - 5. Correction.

4 Witkin Sum. Cal. Law Sales § 259

[§ 259] Correction.

C.C. 2984 deals with the correction of a violation of the regulatory provisions. Any failure to comply with the statute may be corrected by the holder, and if so corrected cannot be the basis of recovery by the buyer, nor will it affect the enforceability of the contract. But both the right to correct and the manner of correction are subject to conditions:

(1) A *wilful violation* cannot be corrected at all unless it is one appearing on the face of the contract and is corrected within 30 days of execution of the contract or within 20 days of its sale, assignment, or pledge, whichever is later.

(2) *Any other violation appearing on the face* of the contract must likewise be corrected within such time periods.

(3) A correction that will *increase the amount* of the contract balance or any installment is not effective unless the buyer concurs in writing.

(4) If the buyer gives *written notice of any failure to comply*, the correction must be made within 10 days of the notice.

(5) The correction must be made by *mailing or delivering a corrected copy* of the contract to the buyer.

(6) *Any amount improperly collected* from the buyer must be credited against the indebtedness or returned to the buyer. (See 10 U.C.L.A. L. Rev. 145.)

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- 6. Venue, Attorneys' Fees, and Costs.

4 Witkin Sum. Cal. Law Sales § 260

[§ 260] Venue, Attorneys' Fees, and Costs.

(1) *Venue*. C.C. 2984.4 specifies the counties in which an action on the contract may be tried (see 3 *Cal. Proc.* (4th), *Actions*, §763), and C.C. 2983.7(f) prohibits a contract term giving the seller or holder the right to sue in any other county.

(2) *Attorneys' Fees and Costs*. Attorneys' fees and costs "shall be awarded" to the prevailing party in any action on the contract, regardless of who brings it. Where the defendant alleges that he or she tendered to plaintiff the full amount due, and then deposits the amount so tendered, the defendant is deemed the prevailing party if the allegation is found to be true. (C.C. 2983.4.) (See *Brown v. West Covina Toyota* (1994) 26 *C.A.4th* 555, 563, 566, 32 *C.R.2d* 85 [prevailing defendant in action by used car buyer against seller and its financing company was not entitled to attorneys' fees under C.C. 2983.4, where gravamen of action was breach of warranty, rather than rights or duties under Rees-Levering Act]; 10 *U.C.L.A. L. Rev.* 153.)

C.C. 1717(b)(2) (there is no prevailing party where action is voluntarily dismissed; see 7 *Cal. Proc.* (4th), *Judgment*, §184) does not bar an award of attorneys' fees under C.C. 2983.4 for a defendant in whose favor a dismissal has been entered in an action on a contract subject to the Act. A contrary interpretation would undermine the Legislature's purpose in enacting a bilateral attorneys' fees provision for cases brought under the Act. The issue whether the voluntary dismissal was truly entered "in favor" of the defendant can arise in a variety of procedural settings, may involve questions of fact, and is a matter best left to the sound discretion of the trial court. (*Damian v. Tamondong* (1998) 65 *C.A.4th* 1115, 1118, 1130, 77 *C.R.2d* 262.)

The statute is silent on the question of who is the party against whom the award should be made. *Golden West Credit Corp. v. Maury* (1969) 270 *C.A.2d Supp.* 913, 75 *C.R.* 757, considered this point. The seller sold an automobile to defendant buyer, then assigned the contract to plaintiff holder. Plaintiff repossessed and sold, and brought this action for a deficiency. The buyer cross-complained against the seller. Judgment was given for the buyer, denying a deficiency and awarding attorneys' fees against the seller. *Held*, affirmed. (a) The buyer, as the successful defendant, was obviously the prevailing party, hence was entitled to fees and costs. (270 *C.A.2d Supp.* 914.) (b) But the action was brought by the holder, and the buyer's cross-complaint sought no relief against the seller--only an award of fees.

Nevertheless, he should be held liable for such fees, for otherwise he could escape all liability by a last minute assignment. (270 C.A.2d Supp. 916.)

A dissenting justice argued that the legislative intent was to permit recovery of fees and costs from the "losing party"--the person who instituted an unmeritorious suit or who interposed an unmeritorious defense--and that here the seller had no interest in the subject matter and no controversy with the buyer. (270 C.A.2d Supp. 916.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Venue*.

Cross-Reference: 3 Cal. Proc. (5th), *Actions*, §845.

(2) *Attorneys' Fees and Costs*. See *Graciano v. Robinson Ford Sales* (2006) 144 C.A.4th 140, 151, 50 C.R.3d 273 [trial judge erred in reducing attorneys' fees requested by plaintiff consumer under C.C. 2983.4 on ground that plaintiff and defendant dealer were "equally prevailing parties," where, after jury found for her on liability, plaintiff settled for approximately twice amount she sought at trial; fact that she dismissed "public benefit" portion of her claims was irrelevant].

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §200.



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4 Witkin Sum. Cal. Law Sales § 261

[§ 261] Consignment Sales.

A vehicle consignment is an arrangement under which a dealer agrees to accept from an owner possession of a motor vehicle that is subject to registration (see *supra*, §235 et seq.) for the purpose of selling the vehicle, and further agrees to pay the owner from the sale proceeds. (*Veh.C.* 266.) A dealer engaging in a consignment with an owner not licensed as a dealer, manufacturer, manufacturer branch, distributor, or distributor branch must execute and comply with a *consignment agreement*, and must pay the consignor within *20 days* after the sale of the vehicle, or be subject to suspension or revocation of its dealer's license. A dealer conducting retail auction sales on behalf of a fleet owner must also execute a consignment agreement, but that agreement is subject to slightly different requirements, as specified. (*Veh.C.* 11729; see *Veh.C.* 11730 [form of consignment agreement]; *22 Pacific L. J.* 458.)

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B. Sale of Vessel.

4 Witkin Sum. Cal. Law Sales § 262

[§ 262] Sale of Vessel.

Veh.C. 9840 et seq. specify registration and transfer requirements for "undocumented vessels," i.e., those not required to have a marine document issued by a federal agency. (On registration and transfer of vessels generally, see *12 Am.Jur.2d* (1997 ed.), *Boats and Boating* §22 et seq.; *70 Am.Jur.2d* (1987), *Shipping* §144 et seq.)

The regulatory body is the Department of Motor Vehicles, and the transfer and registration requirements follow the general pattern of the rules governing motor vehicles (see *supra*, §235 et seq.). *Veh.C. 9840* defines such terms as "owner" (*Veh.C. 9840(b)*), "legal owner" (*Veh.C. 9840(c)*), and "registered owner" (*Veh.C. 9840(d)*). Registration is covered in *Veh.C. 9850* et seq., and transfer of title or interest in *Veh.C. 9900* et seq.

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C. Retail Installment Sale.
1. Nature of Act.

4 Witkin Sum. Cal. Law Sales § 263

[§ 263] Nature of Act.

The 1959 Legislature, acting on a committee report disclosing serious abuses in retail credit and installment sales, adopted the "Unruh Act" (C.C. 1801 et seq.), comprehensively regulating such transactions. (See extensive analysis and criticism in 7 *U.C.L.A. L. Rev.* 618; for comparison with statute regulating automobile sales (supra, §239 et seq.), see 12 *Hastings L. J.* 312; and see generally Cal. Civil Practice, 5 Business Litigation, §57:1 et seq.; Cal. Transactions Forms, 5 Business Transactions §32:75 et seq.) The Act has been frequently amended since its adoption. (See 4 *U.C. Davis L. Rev.* 1 [comprehensive discussion of the original Act and subsequent amendments].)

The Act imposes criminal penalties for wilful violations (infra, §287) and civil penalties for violations not corrected by the holder (infra, §§287, 288). The provisions of the Act cannot be waived. (C.C. 1801.1.)

Installment or revolving accounts (infra, §282 et seq.) are treated separately from installment contracts (infra, §272 et seq.), with different disclosure requirements, finance charge limitations, and other regulatory provisions.

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2. Scope of Act.

a. Retail Installment Contract.

4 Witkin Sum. Cal. Law Sales § 264

[§ 264] Retail Installment Contract.

(1) *In General.* The Act covers every contract for a retail installment sale in which: (a) a finance charge is added to the unpaid balance; (b) the goods or services are available at a lesser price if paid by cash or credit card; (c) the buyer would have received additional or higher quality goods or services if he or she had paid cash equal to the total amount paid in installments; or (d) payment is made in more than four installments. It applies to ordinary sales, security agreements in connection with sales, and bailments and leases with option to acquire title. (C.C. 1802.6.)

Not included, however, are sales of vehicles required to be registered under the Vehicle Code, or the sale of any goods with such a vehicle if sold under a contract governed by C.C. 2982. (See *supra*, §235 et seq.)

(2) *Retail Installment Accounts.* Special provision is made for the regulation of retail installment accounts (revolving accounts). (See *infra*, §282 et seq.) This account is defined as one where (a) the buyer promises to pay, in installments, the outstanding balance incurred in retail installment sales, and (b) the finance charge is a percentage of the periodic balance. (C.C. 1802.7; see 7 *U.C.L.A. L. Rev.* 641.)

(3) *Monthly Insurance Policies Not Included.* In the absence of any remaining balance or underlying debt, the purchase of a monthly insurance policy is not a credit sale within the meaning of the Act. Thus, in *Crawford v. Farmers Group* (1984) 160 C.A.3d 1164, 207 C.R. 155, defendant's automobile insurance purchase plan provided 1 month of coverage for each month a premium was paid, without any obligation to pay or purchase beyond that month. Plaintiff had not contracted to pay the total purchase price for the 6-month period, and could terminate the policy at any time by not paying the next month's premium. *Held, the Act did not apply.* (160 C.A.3d 1169.) (See *Mackey v. Bristol West Ins. Services of Calif.* (2003) 105 C.A.4th 1247, 1271, 130 C.R.2d 536; following *Crawford*.)

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2. Scope of Act.

b. Services.

4 Witkin Sum. Cal. Law Sales § 265

[§ 265] Services.

The Act applies to the sale of work, labor, and services furnished in connection with the sale or repair of goods or the repair of motor vehicles, or the improvement of real property or providing of insurance. Excluded are services for a commercial or business use, services of physicians and dentists, services for which rates are regulated by official agencies, and written service contracts requiring, over a fixed period or specified duration, performance of maintenance or repair services of a motor vehicle subject to a conditional sales contract, where such service contracts are sold in conjunction with the sale or lease of a vehicle requiring registration under the Vehicle Code. (C.C. 1802.2; see 7 *U.C.L.A. L. Rev.* 634.)

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2. Scope of Act.
c. Purchases From Out of State.

4 *Witkin Sum. Cal. Law Sales* § 266

[§ 266] Purchases From Out of State.

The Act applies to sales made by out-of-state sellers *to California residents*, regardless of the contract's recital of its situs, if (1) a communication from the seller soliciting, offering, or agreeing to sell is received in California, or (2) a communication from the buyer soliciting or offering to buy, or accepting the seller's offer, originates within California. (C.C. 1802.19; see 8 *Pacific L. J.* 266.)

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2. Scope of Act.

d. Application to Financing Agency.

4 *Witkin Sum. Cal. Law Sales* § 267

[§ 267] Application to Financing Agency.

In *Morgan v. Reasor Corp.* (1968) 69 C.2d 881, 73 C.R. 398, 447 P.2d 638 (infra, §269), the documents (a contract for the goods and services necessary to construct a home, and a promissory note for an amount representing the cost of the home and a "time price differential," to be paid in monthly installments) were assigned to Midwest Corp., financing agency of the seller, which acquired them without actual knowledge of the defects. Midwest contended that it could assert its rights as a holder in due course, free from defenses available against the seller. The court rejected this contention in one square holding and one strong dictum:

(a) *Application of Act to financing agency without actual knowledge of violations.* Under the established law, a holder in due course has no duty to investigate suspicious circumstances (4 *Summary* (10th), *Negotiable Instruments*, §27). But the purpose of C.C. 1812.7 (infra, §287) is to bring pressure on consistent seller violators, and to place the burden of a bad deal on financing agencies, which have the ability and skill to recognize bad dealers, rather than on the consumer. Accordingly, under a liberal interpretation of C.C. 1812.7, constructive knowledge, imputed from facts sufficient to put a reasonable person on inquiry, will preclude recovery of the time price differential by a financing agency. (69 C.2d 893.)

(b) *Application of Act to financing agency closely connected with seller.* The dictum states another reason for barring a financing agency: It may be denied the status of a holder in due course because it is too closely connected with the seller or the sale; e.g., where it supplies the seller with forms, consults the seller about the deal, knows all of the details in advance, or financed prior sales. In this situation, the financing agency may be regarded as a party to the original transaction, as in *Commercial Credit Corp. v. Orange County Machine Works* (1950) 34 C.2d 766, 214 P.2d 819: The seller has no intention of extending personal credit, and is in effect an agent for the financing company, an undisclosed principal. (69 C.2d 895.) (See 58 Cal. L. Rev. 214.)

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3. Exclusions.

a. Inapplicable to Commercial Sales.

4 Witkin Sum. Cal. Law Sales § 268

[§ 268] Inapplicable to Commercial Sales.

The Act applies only to sales of goods to consumers. This appears from the definition of "goods" (C.C. 1802.1, "for use primarily for personal, family or household purposes"), and from a comparison of provisions of the Act and the Commercial Code (see U.C.C. 9102, giving separate definitions of consumer goods and equipment, and U.C.C. 9102, Official Comment 4, explaining that the categories are mutually exclusive). (See *James Talcott v. Gee* (1968) 266 C.A.2d 384, 386, 72 C.R. 168 [conditional sale of printing press to printer; Unruh Act right to prepayment and prohibition of deficiency judgments inapplicable].)

Whether the goods are bought primarily for personal use depends on the intent of the parties at the time of purchase, and not on the actual later use. The creditor should not be required to monitor the use, and neither party should be permitted to change the classification in order to preclude a deficiency judgment or to obtain such a judgment. (*Cessna Finance Corp. v. Pivo* (1976) 58 C.A.3d 281, 287, 129 C.R. 888 [sale of small aircraft to practicing pharmacists who leased them to flying club for primary use by others; Unruh Act inapplicable].)

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3. Exclusions.

b. Inapplicable to Real Property.

4 *Witkin Sum. Cal. Law Sales* § 269

[§ 269] Inapplicable to Real Property.

In *Morgan v. Reasor Corp.* (1968) 69 C.2d 881, 73 C.R. 398, 447 P.2d 638, the court construed the Act to cover a transaction commonly thought outside its scope. Plaintiffs owned a lot, and agreed to buy a house to be constructed by IBC Corp. on that lot. The contract provided that IBC sold and plaintiffs bought the goods and services necessary for construction. Plaintiffs granted the lot and all improvements to Bay Title Co. as security for payments, and executed a promissory note for \$ 19,398.12, representing the \$ 11,844 cost of the house plus a "time price differential" of \$ 7,554.12. IBC Corp. assigned the contract and note to Midwest Corp., its financing agency. Later, IBC Corp. merged with defendant Reasor Corp., which assumed its liabilities. Plaintiffs then brought this action for declaratory relief, proving several Unruh Act violations (contract and note not a single document, note not dated at time of execution, contract contained blank spaces later filled in), and invoking the sanction of C.C. 1812.7 against recovery of the time price differential. *Held*, judgment for plaintiffs affirmed. C.C. 1802.1, defining goods, includes those to be affixed to real property, and C.C. 1802.2, defining services, applies to those in connection with improvement of real property. Both sections emphasize noncommercial use, and the definitions carry out the broad object of consumer protection. (69 C.2d 887.) (See 58 Cal. L. Rev. 209.)

The *Morgan* holding on this point was promptly repudiated by the 1969 Legislature. C.C. 1801.4 states that the Act shall not apply to any contract or series of contracts for (1) "the construction, sale, or construction and sale of an entire residence, including a mobilehome, or all or part of a structure designed for commercial or industrial occupancy, with or without a parcel of real property or an interest therein," or (2) "the sale of a lot or parcel of real property, including any site preparation incidental to such sale." The enacting statute adds: "This act is intended to abrogate any contrary rule in *Morgan v. Reasor Corp.*" (Stats. 1969, Chap. 554, §2 [see note, West's Annotated C.C. 1801.4]; see also Stats. 1979, Chap. 1151, §5 ["Nothing in this act [enacting C.C. 1801.6, 1801.7, 1803.9, and 1812.20] is intended to abrogate the decision in *Morgan v. Reasor Corp.* ... to the extent such decision has not been modified by Chapter 554 of the Statutes of 1969 or other subsequent legislative amendments to the Unruh Act"].)

C.C. 1801.4 was not directed at assignees, and the holding in the *Morgan* case on the financing agency's duty is still effective. (See *supra*, §267.)

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3. Exclusions.

c. Inapplicable to Aircraft or Vessel.

4 Witkin Sum. Cal. Law Sales § 270

[§ 270] Inapplicable to Aircraft or Vessel.

The Act does not apply to (1) the sale of any aircraft required to be registered under the Federal Aviation Act of 1958, or (2) the sale of any vessel (as defined in *Veh.C. 9840(a)*) if the cash price of the vessel, including accessories and equipment sold in conjunction therewith, exceeds \$ 25,000. (C.C. 1801.4.)

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3. Exclusions.

d. Loan by Supervised Financial Organization.

4 *Witkin Sum. Cal. Law Sales* § 271

[§ 271] Loan by Supervised Financial Organization.

(1) *King Case*. In *King v. Central Bank* (1977) 18 C.3d 840, 135 C.R. 771, 558 P.2d 857, plaintiffs alleged that they purchased an automobile insurance policy from defendant bank and R, a broker, on credit; that the purchase was in violation of the Unruh Act finance charge limitations and disclosure requirements (first cause of action); and that it was also in violation of the disclosure provisions of the federal Truth-in-Lending Act (second cause of action). *Held*, the complaint was sufficient in both causes of action. As to the Unruh Act:

(a) *Furnishing services*. The Act applies to any "retail installment contract," but defines "seller" as a person engaged in selling goods "or furnishing services" (C.C. 1802.3), and defines "services" to include those "furnished in connection with ... the providing of insurance" (C.C. 1802.2). (18 C.3d 844.)

(b) *Loan to finance payment of insurance premiums*. It is not necessary to decide whether the Act applies to all routine insurance financing transactions. The complaint alleged additional facts supporting an inference that defendant bank actually engaged in providing insurance, within C.C. 1802.2, *supra*: It was alleged that the bank and R are engaged in the retail sale of insurance for credit, and that plaintiffs purchased an insurance policy from them; also that the bank's financing activities were intimately linked with the insurance purchase transaction; e.g., by furnishing printed forms to R containing the terms of credit sales of automobile insurance, by controlling R's determination of which policies could be purchased on credit and on what terms, and in sharing the profits from the contracts. These allegations, if proved, would support a finding that R and the bank were jointly engaged in "providing" automobile insurance. (18 C.3d 845.)

(c) *Substance of transaction governs*. The Act must be liberally construed to protect consumers by expanding rather than limiting its coverage, and substance, not form, determines its application. Hence, the fact that the agreement on its face appears to be a loan instrument does not preclude a finding that it was in substance an installment sale of automobile insurance. (18 C.3d 846, 847.) (See 66 Cal. L. Rev. 253.)

(2) *Legislative Response to King Case*. The Legislature responded to the *King* case by enacting C.C. 1801.6 and C.C. 1801.7 in 1979 (see 11 Pacific L. J. 393), and by amending C.C. 1801.6 in 1980 to add a declaration of legislative intent: "The Legislature finds that the decisional law of this state regarding the characterization of credit transactions as either loans or credit sales has been made unclear by the holding in *King v. Central Bank*, 18 Cal.3d 840. It is the

purpose of subdivision (b) to clarify such law by establishing standards for determining whether a transaction is subject to the Unruh Act. However, subdivision (b) is not intended to abrogate the judicial principle that the substance of a transaction rather than its form is determinative of its characterization as a loan or credit sale as exemplified by such decisions as *Verbeck v. Clymer*, 202 Cal. 557, *Milana v. Credit Discount Co.*, 27 Cal.2d 335, and *Boerner v. Colwell Co.*, 21 Cal.3d 37. Subdivision (b) also is not intended to abrogate the decision in *Morgan v. Reasor Corp.*, 69 Cal.2d 881, to the extent such decision has not been modified by Chapter 554 of the Statutes of 1969 or other legislative amendments to the Unruh Act." (C.C. 1801.6(a); on *Verbeck v. Clymer* and *Boerner v. Colwell Co.*, see 1 *Summary* (10th), *Contracts*, §476; on *Milana v. Credit Discount Co.*, see 1 *Summary* (10th), *Contracts*, §471; for a discussion of *Morgan v. Reasor Corp.*, see *supra*, §269.)

C.C. 1801.6(b) provides that the Act *does not apply* to a transaction in the form of a loan by a "supervised financial organization" unless the organization and seller are related by common ownership and control and the relationship was "a material factor" in the loan transaction, or they share in the profits and losses of either or both the sale and loan. (For the definition of "supervised financial organization," see C.C. 1801.6(c)(1); on what does not constitute profit sharing, see C.C. 1801.6(c)(2); on what does not constitute participating in or sharing of loan losses, see C.C. 1801.6(c)(3).) C.C. 1801.7, in turn, excludes coverage of premium finance agreements entered into by industrial loan companies pursuant to *Fin.C. 18560 et seq.* (See 1 *Summary* (10th), *Contracts*, §460.)

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- aa. Written and Signed.

4 Witkin Sum. Cal. Law Sales § 272

[§ 272] Written and Signed.

The contract must be written and dated. If printed, the type must be no smaller than 8-point. (C.C. 1803.1.) Except for add-on sales, it must be a single document containing the entire agreement relating to the cost and terms of payment, including any promissory notes or other evidences of indebtedness. (C.C. 1803.2.) It must be clearly labeled (i.e., "Security Agreement" or "Retail Installment Contract") in at least 12-point bold type at the top of the contract. (C.C. 1803.2(b).)

The contract must be complete: "The seller shall not obtain the signature of the buyer to a contract when it contains blank spaces to be filled in after it has been signed." (C.C. 1803.4.)

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- bb. Disclosure of Cost Items.

4 Witkin Sum. Cal. Law Sales § 273

[§ 273] Disclosure of Cost Items.

C.C. 1803.3 requires disclosure of the following cost items: (1) the disclosures required by Regulation Z, whether or not that regulation applies to the transaction (C.C. 1803.3(b)), and the disclosures must include any deferred downpayment (C.C. 1803.3(d)); (2) the amount financed (C.C. 1803.3(c)); (3) a brief description of any property being traded in as part of the downpayment (C.C. 1803.3(e)); and (4) the method of computing the finance charges under the precomputed or simple-interest method (C.C. 1803.3(f)).

The "amount financed" is arrived at by (1) adding the cash price, the taxes imposed on the sale, the amount to be paid to any public officer for official fees, and the amount of premiums for insurance policies included in the contract (itemized as specified in subdivision (g)); and (2) subtracting therefrom the sum of the amount of the buyer's downpayment (itemized as specified in subdivision (c)(5)) and the administrative finance charge. Each of these component parts of the amount financed must be disclosed. (C.C. 1803.3(c).) (On statutory disclosure requirements generally, see *14 A.L.R.3d* 330.)

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 - cc. Notice to Buyer.

4 Witkin Sum. Cal. Law Sales § 274

[§ 274] Notice to Buyer.

(1) *General Requirement.* Under C.C. 1803.2(c), where the contract includes a finance charge determined on the precomputed basis, and provides that the unearned portion of the finance charge to be refunded upon full prepayment of the contract is to be determined by a method other than actuarial, the contract must contain (in at least 10-point bold type if the contract is printed) a general warning of the buyer's rights and liabilities:

"Notice to buyer: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in. (2) You are entitled to a completely filled-in copy of this agreement. (3) You can prepay the full amount due under this agreement at any time and obtain a partial refund of the finance charge if it is \$ 1 or more. Because of the way the amount of this refund will be figured, the time when you prepay could increase the ultimate cost of credit under this agreement. (4) If you desire to pay off in advance the full amount due, the amount of the refund you are entitled to, if any, will be furnished upon request."

Where the finance charge is determined on the precomputed basis and provides for the actuarial method for computing the unearned portion of the finance charge upon prepayment in full, the notice is the same as set out above, with the exception that the third provision of the notice need not contain a warning that the time of prepayment can increase the ultimate cost of credit. (C.C. 1803.2(d).)

Where the finance charge is determined on the simple-interest basis, the notice is also the same as set out above, except that the third provision of the notice must state only that the full amount due under the agreement can be prepaid at any time. (C.C. 1803.2(e).)

(2) *Contract Providing for Security Interest in Real Property.* C.C. 1803.2(b)(3) requires that any contract for goods or services providing for a security interest in real property must contain the following notice in at least 14-point boldface type, separated from the rest of the contract by a border, directly above the space reserved for the buyer's signature:

"WARNING TO BUYER: IF YOU SIGN THIS CONTRACT, YOU WILL BE PUTTING UP YOUR HOME AS SECURITY. THIS MEANS THAT YOUR HOME COULD BE SOLD WITHOUT YOUR PERMISSION AND WITHOUT ANY COURT ACTION IF YOU MISS ANY PAYMENT AS REQUIRED BY THIS CONTRACT." This notice must be in the same language (e.g., Spanish) used in the contract.

Failure to include the required notice will render the security interest void and unenforceable.

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- dd. Compliance With Regulation Z.

4 Witkin Sum. Cal. Law Sales § 275

[§ 275] Compliance With Regulation Z.

The seller must also comply with the disclosure requirements of Regulation Z, promulgated under the federal Consumer Credit Protection Act (Truth in Lending Act). (See 12 C.F.R. §226.1 et seq.; 15 U.S.C., §1601 et seq.; *Crawford v. Farmers Group* (1984) 160 C.A.3d 1164, 1169, 1170, 207 C.R. 155, supra, §264 [compliance not required where there was no underlying debt or obligation to make full payment, hence no consumer credit transaction]; 2 Fonseca 3d, Handling Consumer Credit Cases, Chap. 17; 24 *Stanf. L. Rev.* 793; 4 *U.C. Davis L. Rev.* 124, 179; 76 Proof of Facts 3d 193 [class actions for failure to make disclosures required by Regulation Z].)

The problems of double disclosure and inconsistent requirements are covered by C.C. 1801.5. (See 4 *U.C. Davis L. Rev.* 148.) This section provides that (1) nothing in the Act "shall be deemed to prohibit the disclosure ... of additional information required or permitted under Regulation Z, as in effect at the time such disclosure is made" and (2) disclosure may be "in any manner, method, or terminology required or permitted under Regulation Z, as in effect at the time such disclosure is made, except that permitted by paragraph (2) of subdivision (c) of Section 226.18 of Regulation Z, provided that all of the requirements and limitations set forth in subdivision (b) of Section 1803.3 are satisfied." (For the broadened definition of Regulation Z, see C.C. 1802.18; on C.C. 1803.3(b), see supra, §273.)

The second cause of action in *King v. Central Bank* (1977) 18 C.3d 840, 135 C.R. 771, 558 P.2d 857, supra, §271, was for violation of the Truth in Lending Act. *Held*, the allegations supported an inference that defendant bank participated in a credit sale; i.e., its participation in the sale of insurance to plaintiffs, and its close connection with R in procuring insurance for plaintiffs. (18 C.3d 848.) (On the legislative response to the *King* case, see supra, §271.)

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See 44 *San Diego L. Rev.* 611 [Truth in Lending Act and Regulation Z].



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 - 2. Copy to Buyer.

4 Witkin Sum. Cal. Law Sales § 276

[§ 276] Copy to Buyer.

(1) *Requirement of Delivery.* At the time the buyer signs, the seller must deliver a "legible copy" of the contract and any other document the seller "has required or requested the buyer to sign, and which he has signed, during the contract negotiation." Until the documents are delivered, "the buyer shall be obligated to pay only the cash price." (C.C. 1803.7.) An exception is made for sales by mail or telephone where the seller's terms are clearly set forth in a public catalog. (C.C. 1803.8.)

If the seller or holder of the paper procures any insurance, a copy of the policy must also be mailed to the buyer. (C.C. 1803.5(c).)

(2) *Acknowledgment of Delivery.* An acknowledgment that the buyer has received the documents must be in conspicuous writing or printing (at least 10-point bold type). If it is contained in the contract, it must be directly above the buyer's signature. The acknowledgment raises a rebuttable presumption of delivery in favor of an assignee. However, if the holder furnishes the buyer a copy or a notice containing the items required by C.C. 1803.3 (see *supra*, §273), and requests written notice of lack of a copy within 30 days, and no such notice is given, it is then conclusively presumed in the holder's favor that a copy was furnished. (C.C. 1803.7; see 4 *U.C. Davis L. Rev.* 19.)

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- 3. Prohibited Terms and Acts.

4 Witkin Sum. Cal. Law Sales § 277

[§ 277] Prohibited Terms and Acts.

(1) *In General.* C.C. 1804.1 lists a number of provisions that cannot lawfully be included in the contract. These include:

(a) The buyer agrees not to assert against the seller "a claim or defense arising out of the sale" or against the seller's assignee a claim or defense other than as provided by C.C. 1804.2 (see *infra*, §281). (C.C. 1804.1(a).) However, C.C. 1804.1(a) does not preclude a contractual waiver of the defense of the statute of limitations. (*Mysel v. Gross* (1977) 70 C.A.3d Supp. 10, 17, 138 C.R. 873.)

The opinion in *Mysel, supra*, quotes one commentator to the effect that C.C. 1804.1(a) is aimed at contractual provisions that would deny the buyer relief for the seller's defaults and other misconduct, and another commentator who thinks its purpose is to preclude the use of "stock provisions" with such extensive waivers of rights as to make the purchaser of the seller's contract a virtual holder in due course. (70 C.A.3d Supp. 17.) Waiver of the statute of limitations is distinguishable: "[I]t does not itself relieve the seller or his assignee from liability for his misconduct or defaults, nor from any other statutory obligation. It merely extends the time within which any action must be brought within the meaning of the comments just set forth. Neither can it be considered to be in such close proximity with the sale, so as to arise out of it." (70 C.A.3d Supp. 18.)

(b) The holder may accelerate maturity of all or any part of the amount due in the absence of the buyer's default. (C.C. 1804.1(b).)

(c) A power of attorney to confess judgment in this state. (C.C. 1804.1(c).)

(d) An assignment of wages (except by separate instrument under *Lab.C. 300, 1 Summary* (10th), *Contracts*, §724). (C.C. 1804.1(c).)

(e) The seller or holder of the contract or other person acting on the seller's or holder's behalf may enter the buyer's premises "unlawfully" or "commit any breach of the peace" in repossessing the goods. (C.C. 1804.1(d).)

(f) The buyer waives a right of action against the seller or holder of the contract or other person acting on the seller's or holder's behalf "for any illegal act" committed in collection of payments or in repossession. (C.C. 1804.1(e).)

(g) A power of attorney appointing the seller or holder of the contract or other person acting in the seller's or holder's behalf "as the buyer's agent" in collection of payments or in repossession. (C.C. 1804.1(f).)

(h) The buyer relieves the seller from "liability for any legal remedies" that the buyer may have under the contract or any separate instrument executed in connection therewith. (C.C. 1804.1(g).)

(i) The buyer agrees to pay any charge for exercising his or her right to rescind or "void" the contract. (C.C. 1804.1(h).)

(j) A provision for venue in an action by the seller or holder of the contract, giving the right to sue in a county other than a county specified in the venue provisions of the Act (see C.C. 1812.10, 3 *Cal. Proc.* (4th), *Actions*, §763). (C.C. 1804.1(i).)

(k) The seller takes a security interest, other than a mechanic's lien, in the property of the buyer, where the property is the buyer's primary residence, the buyer is 65 years of age or older, and the contract is for a home improvement. (C.C. 1804.1(j).)

The inclusion of any of these unlawful provisions does not affect the validity of the contract, but the provision itself is void. (C.C. 1804.4.)

(2) *No Discount for Assistance in Sales.* It is unlawful for the seller to induce a person to contract by offering a "rebate, discount, commission, or other consideration" on the condition that the buyer sell or assist in the sale of the same or related goods. (C.C. 1803.10; see 4 *U.C. Davis L. Rev.* 27.)

(3) *No Security Interest in Other Property.* Except for service contracts, the contract cannot provide for a security interest in any fully paid goods or goods that were not sold by the seller. (C.C. 1804.3(a).) A provision for a security interest in real property where the goods sold are not to be attached to the realty is a violation of the Act and subject to its penalty provisions (see *infra*, §287). (C.C. 1804.3(b).) Such a prohibited provision is void, but the validity of the contract is not otherwise affected. (C.C. 1804.4.)

(4) *No Requirement of Financing From Particular Lender.* C.C. 1812.20 provides that "[n]otwithstanding Section 1801.6, no person shall require a purchaser of goods or services to obtain financing from any particular source. Any person who violates this section shall be subject to the penalty provided in Section 1812.6." (See 11 *Pacific L. J.* 393; on C.C. 1801.6, see *supra*, §271; on C.C. 1812.6, see *infra*, §287.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.*(j) *Provision for venue:*

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §845.



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 - 4. Limitation of Charges.

4 Witkin Sum. Cal. Law Sales § 278

[§ 278] Limitation of Charges.

The Act limits the amount of finance charges (C.C. 1805.1 et seq.), refinance and consolidation charges (C.C. 1807.2), delinquency charges (C.C. 1803.6), and the charges for add-on sales (C.C. 1808.1 et seq.). Insurance charges are limited to the premiums actually charged by the insurer. (C.C. 1803.5(b).)

(1) *Finance Charge.* The finance charge which is subject to limitation under C.C. 1805.1 is the total allowable charge for both *services and extension of credit*. Any other fees not specifically permitted by statute are prohibited, except that a \$ 15 fee, not to be considered a "charge" within the meaning of the statute, may be imposed when a check, negotiable order of withdrawal, or share draft has been dishonored. (C.C. 1805.4.)

Under C.C. 1805.1, the finance charge may not exceed the dollar amount shown under C.C. 1803.3(b) (*supra*, §273), except to the extent (a) caused by the holder's receipt of payments under a contract providing for determination of all or part of the finance charge on the 365-day basis at a time or times other than originally scheduled; (b) permitted by Regulation Z (*supra*, §275); or (c) permitted by C.C. 1805.8. C.C. 1805.8 limits the finance charge imposed on amounts advanced by the holder subsequent to execution of the contract for insurance, repairs to or preservation of the goods, or preservation of the holder's security interest, to the annual percentage rate disclosed under C.C. 1803.3(b).

The finance charge for goods purchased may not commence to run until the goods are delivered or made available to the buyer. (C.C. 1805.6.)

(2) *Calculation of Interest.* "Simple-interest basis" is defined as applying a constant rate to the unpaid balance as it changes, calculated either on a 365-day year, or, until January 1, 1988, on a 360-day year. (C.C. 1802.20.) "Precomputed basis" is defined as "multiplying the original unpaid balance of the contract by a rate and multiplying that product by the number of payment periods elapsing between the date on which the finance charge begins to be assessed and the date of the last scheduled payment." (C.C. 1802.21.) Charges may not be determined on the precomputed basis if the date on which the final installment is due, according to the original terms of the contract, is more than 62 months after the date of the contract. (C.C. 1805.7.)

No contract may use both methods, except one for insurance, repairs to, or preservation of the goods or the holder's security interest, under C.C. 1805.8. (C.C. 1805.9.)

(3) *Advertising Restriction.* C.C. 1803.11 prohibits a seller from soliciting buyers, in any advertisement, to enter into a retail installment contract with it if the seller does not intend to sell the contract to a financing agency or other assignee, unless the advertisement *clearly states the periodic rate* or range of periodic rates (expressed as an annual percentage rate or range of annual percentage rates) that will be used to determine the finance charge.

(4) *Delinquency Charge.* The contract may provide that, for each installment in default, the buyer is liable for a delinquency charge limited to \$ 10, if the period of default is not less than 10 days, and \$ 15, if the period of default is not less than 15 days. Only one delinquency charge may be collected on any one installment. (C.C. 1803.6; on extension of time for payment by National Guard member in active service, see 1 *Summary* (10th), *Contracts*, §764.)

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SUPPLEMENT: [This section is current through the latest supplement]



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- 5. Right To Rescind If Financing Unavailable.

4 Witkin Sum. Cal. Law Sales § 279

[§ 279] Right To Rescind If Financing Unavailable.

C.C. 1803.9 provides that, when it is "explicitly understood" that all or part of the cash paid will be from the proceeds of a loan from a third party, the buyer may rescind if he or she is unable to obtain that financing "upon reasonable terms after having made a reasonable effort to obtain it," and so notifies the seller within 3 business days. "[A]ll considerations thereupon shall be returned by the respective parties without further demand." (See *11 Pacific L. J.* 393.)

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- 6. Right To Pay Before Maturity.

4 Witkin Sum. Cal. Law Sales § 280

[§ 280] Right To Pay Before Maturity.

The buyer is entitled on written request to a detailed statement of the unpaid balance. (C.C. 1806.2.) And, notwithstanding contrary provisions in the contract, the buyer may pay in full at any time before maturity. (C.C. 1806.3(a).)

Where the contract determines the finance charge on the precomputed basis, the buyer must pay the outstanding contract balance, but is entitled to a refund credit in the amount of the unearned portion of the finance charge, as specified. (C.C. 1806.3(a)(1) [no refund is required where it would amount to less than \$ 1].) The buyer is entitled to the refund credit when the indebtedness is satisfied through surrender, repossession or redemption of the collateral, or entry of a judgment. (C.C. 1806.3(b); see 5 *Pacific L. J.* 298.)

If the simple-interest method is used, the buyer must pay the outstanding contract balance plus the earned finance charge, as specified. (C.C. 1806.3(a)(2).) Delinquency charges, authorized by C.C. 1803.6, may also be collected. (C.C. 1806.3(c).)

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- 7. Assignment by Seller.

4 Witkin Sum. Cal. Law Sales § 281

[§ 281] Assignment by Seller.

(1) *Former Law.* Prior to 1976, notwithstanding any contrary agreement, an assignee of the seller's right was subject to all equities and defenses of the buyer against the seller arising out of the sale and existing in the buyer's favor at the time of the assignment. (Former C.C. 1804.2; see 85 *Harv. L. Rev.* 1409; 4 *U.C. Davis L. Rev.* 20; 7 *U.S.F. L. Rev.* 130; 39 *A.L.R.3d* 518; on former limitation that buyer's rights could be asserted only as a matter of defense, see *Vasquez v. Superior Court* (1971) 4 *C.3d* 800, 823, 94 *C.R.* 796, 484 *P.2d* 964.) But the assignee's liability could not exceed the amount of the debt owing at the time that notice of equities and defenses was given. (Former C.C. 1804.2.)

(2) *Extension of Assignee's Liability.* C.C. 1804.2 was amended in 1975 to extend the liability of the assignee under assignments made on or after January 1, 1976. The revised section, virtually identical with amended C.C. 2983.5 (*supra*, §247), provides as follows:

(a) The assignee is subject to equities and defenses even though they were not in existence at the time of the assignment. (C.C. 1804.2(a).)

(b) The assignee's liability may not exceed the amount of the debt owing to the assignee at the time of the assignment. (C.C. 1804.2(a).)

(c) The buyer's right to assert equities and defenses cannot be waived. (C.C. 1804.2(a).)

(d) The assignee has recourse against the seller to the extent of any liability incurred, regardless of a statement that the assignment was without recourse. (C.C. 1804.2(b).) (See 7 *Pacific L. J.* 273; *Music Acceptance Corp. v. Lofing* (1995) 32 *C.A.4th* 610, 622, 39 *C.R.2d* 159 [in action by piano seller's assignee for breach of contract against buyer, jury's finding that seller had breached implied warranty of merchantability made its verdict in favor of assignee erroneous, because under C.C. 1804.2 seller's breach of warranty could be asserted against assignee; result was same under similar Federal Trade Commission rule]; for criticism of the Federal Trade Commission rule, see 25 *U.C.L.A. L. Rev.* 821.)

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 - b. Retail Installment Accounts.
 - 1. Required Disclosures.

4 Witkin Sum. Cal. Law Sales § 282

[§ 282] Required Disclosures.

(1) *Disclosures and Acceptance.* A retail installment account agreement is not effective until the disclosures required by C.C. 1810.1 (infra, this section) have been made, and until the agreement has been "accepted." An agreement is deemed to be accepted if (a) the buyer signs the agreement, including an application containing the terms of the agreement, or (b) the account is used by the buyer or a person who has been authorized by the buyer to use the account, and the buyer has been notified in writing that use of the credit card will mean that the agreement has been accepted by the buyer. A subsequent change in the agreement does not become effective until the seller has given notice of the change and has complied with C.C. 1810.3(d) (infra, this section). (C.C. 1810.)

C.C. 1810.1 requires written disclosure by the seller of a number of matters relating to finance or service charges. Included in the statement, which must be given to the customer before transactions begin, are the conditions under which a finance charge may be imposed, the rate of charge, and the method of determining both the amount of the charge and the balance on which it may be imposed. Until the seller delivers this statement, "the buyer shall be obligated to pay only the cash price of the goods or services."

(2) *Statement of Buyer's Account.* For each billing cycle in which the buyer's balance exceeds \$ 1, or where a finance charge is imposed, the seller must mail or deliver a written statement detailing the buyer's account. The statement must be in the prescribed form (see C.C. 1810.3(c)), and must include such matters as the previous balance, the amounts credited, the amount of any finance charge and the method of determining it and the balance on which it was imposed, and the new balance and the date on which payment must be made to avoid additional finance charges. Excepted from these provisions are accounts deemed uncollectable and accounts for which collection proceedings have been instituted. (C.C. 1810.3(a).)

The seller must mail or deliver the statement of the buyer's account at least 14 days prior to the date by which payment must be made in order to avoid additional finance charges. (C.C. 1810.3(b).)

If the account has a credit balance exceeding \$ 1 at the end of a billing cycle (see C.C. 1810.3(h)), the seller must either refund it or send the buyer successive notices of the credit in a prescribed manner. (C.C. 1810.3(e).) If the account

remains dormant for 6 months, the seller must take specified steps to refund the credit at the buyer's last known address. (C.C. 1810.3(f).) After 3 years, an unrefundable credit balance escheats to the state. (C.C. 1810.3(g).)

Penalties are provided for failure to make timely response to an inquiry by the buyer about any debit or credit in connection with the buyer's account. (See *infra*, §287.)

(3) *Change in Terms of Account.* The seller must mail or deliver written notice of any proposed change in the terms of the account. The notice must be given at least 30 days prior to the effective date of the change or 30 days prior to the start of the billing cycle within which it will become effective, whichever is earlier. The following changes are effective only with respect to purchases made on or after the effective date of the change: (a) an increase in any component of a finance charge, (b) a change in a charge permitted by C.C. 1810.4 (*infra*, §283), or (c) a change in the attorneys' fee provision in the agreement under C.C. 1810.4. (C.C. 1810.3(d).)

(4) *Request for Statement of Finance Charges.* The buyer may request, not more frequently than once a year, information as to the total amount of finance charges assessed on the account during the preceding calendar year. On receiving the request, the seller must provide the information without charge within 30 days. (C.C. 1810.11.)

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4 Witkin Sum. Cal. Law Sales § 283

[§ 283] Limitation of Charges.

(1) *Amount of Finance Charge.* C.C. 1810.2 formerly imposed a maximum finance charge depending on the amount of the outstanding balance. (See *Seibert v. Sears, Roebuck & Co. (1975) 45 C.A.3d 1, 19, 120 C.R. 233* [maximum charge may be computed on previous balance without deduction for amounts credited during billing cycle].) As amended in 1988, the statute provides that, subject to the other provisions of C.C. 1810 et seq., the seller or holder of a retail installment account may charge, receive, and collect a finance charge "as disclosed to the buyer" under C.C. 1810.3 (*supra*, §282).

(2) *Commencement of Finance Charge.* The finance charge for goods purchased may not commence to run until the goods are delivered or made available to the buyer. (C.C. 1810.10.)

(3) *Credit Card Fee.* If a credit card is issued in connection with a retail installment account, the seller may impose an annual fee of up to \$ 15 for membership in the credit card plan, which will not be considered as a finance charge or as interest "for any purpose of the law." (C.C. 1810.4.)

(4) *Dishonored Check Fee.* The seller or holder of a retail installment account may collect a \$ 15 fee, not to be considered a "charge" within the meaning of the Unruh Act, when a check, negotiable order of withdrawal, or share draft has been dishonored. (C.C. 1810.4.)

(5) *Delinquency, Collection, and Insurance Charges.* Notwithstanding C.C. 1810.4, delinquency and collection charges may be imposed by a seller or a holder of a retail installment account if the buyer has signed an agreement to that effect and has been given a copy. (C.C. 1810.12.) Insurance charges are limited to the premiums actually charged by the insurer. (C.C. 1810.5.)

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 - 3. Other Regulations.

4 Witkin Sum. Cal. Law Sales § 284

[§ 284] Other Regulations.

(1) *No Separate Notes Waiving Buyer's Rights.* "No retail installment account shall require or entail the execution of any note or series of notes by the buyer which when separately negotiated will cut off as to third parties any right of action or defense which the buyer may have against the seller." (C.C. 1810.7.)

(2) *Retention of Security Interest.* The seller may by agreement retain a security interest in the goods sold until full payment has been made. For purposes of releasing security interests in goods bought on different dates, payments other than the downpayment on a specific purchase must be deemed allocated so that goods or services purchased first are first paid for, and, in case of purchases made on the same date, the lowest priced is deemed first paid for. (C.C. 1810.6.)

(3) *Agreement Where Insurance Is Separately Charged.* An agreement is required where insurance costs are to be separately charged to the buyer. The agreement must state who is to procure the insurance and must be signed by both parties with a copy given or furnished to the buyer. (C.C. 1810.5.)

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C. Retail Installment Sale.

4. Regulatory Provisions.

c. Repossession and Resale.

1. In General.

4 Witkin Sum. Cal. Law Sales § 285

[§ 285] In General.

If the buyer defaults under an installment contract or account, the holder may either bring an action for the balance due or retake the goods. (C.C. 1812.2; see Cal. Civil Practice, 5 Business Litigation, §§57:33, 57:34; Cal. Transactions Forms, 5 Business Transactions §32:87; 45 *A.L.R.3d* 1233 [validity of provision authorizing summary repossession]; 49 *A.L.R.3d* 364 [repossession as affecting right to recover on downpayment note].) The practice on repossession and resale is severely restricted:

(1) *Notice to Buyer and Redemption.* A seller who elects to resell or to retain the goods must give notice to the buyer within 10 days after repossession, and in that notice must state the amount of the charges that the buyer must pay within 10 days of the notice in order to redeem. (C.C. 1812.2; on manner of giving notice, see C.C. 1812.3.) The buyer has an absolute right to redeem by payment or tender of the balance within 10 days after the notice is given, or at any time before sale by paying also any additional expenses incurred in preparation for sale. (C.C. 1812.2.) (See 4 *U.C. Davis L. Rev.* 14, 24; 13 *U.C.L.A. L. Rev.* 354.)

(2) *Proceeds of Resale.* The proceeds of the resale are applied to the expenses of the sale and of taking and keeping the goods, and to the satisfaction of the contract. Any additional sums must be paid to the buyer. (C.C. 1812.4.)

(3) *No Deficiency Judgment.* "[T]he holder may not recover the deficiency from the buyer or from anyone who has succeeded to the obligations of the buyer." (C.C. 1812.5.)

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- 2. Collateral Recovery Act.

4 Witkin Sum. Cal. Law Sales § 286

[§ 286] Collateral Recovery Act.

In 1981, the Legislature enacted the Collateral Recovery Act (*B. & P.C. 7500 et seq.*), originally entitled the Repossessors Act, to govern any individual, partnership, or corporation engaged in the business of locating or repossessing personal property sold under a security agreement. Provision is made for licensing repossession agencies (*B. & P.C. 7503 et seq.*) and issuing qualification certificates to agency managers (*B. & P.C. 7504 et seq.*). For the commission of any of the specified prohibited acts, a fine may be assessed (*B. & P.C. 7508 et seq.*), or the license, qualification certificate, or registration may be suspended or revoked (*B. & P.C. 7510 et seq.*).

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C. Retail Installment Sale.

5. Violation of Act.

a. Penalties.

4 *Witkin Sum. Cal. Law Sales* § 287

[§ 287] Penalties.

(1) *Criminal Penalties.* A wilful violation of any provision of the Act is a misdemeanor. (C.C. 1812.6; see 7 *U.C.L.A. L. Rev.* 762.)

(2) *Noncompliance.* A seller who fails to comply with the provisions of the Act, and any person who acquires the contract or account "with knowledge" of the seller's violation, are precluded from recovering any finance charge or any delinquency, collection, extension, deferral, or refinance charge, and the buyer is entitled to recover "from such person" any of those charges that have already been paid. (C.C. 1812.7; see *Morgan v. Reasor Corp.* (1968) 69 *C.2d* 881, 893, 73 *C.R.* 398, 447 *P.2d* 638, *supra*, §267 [constructive knowledge precluded recovery of charges by financing agency]; *Fresno Loan & Thrift v. Roberts* (1962) 207 *C.A.2d Supp.* 899, 902, 903, 25 *C.R.* 624; 7 *U.C.L.A. L. Rev.* 762; *Cal. Civil Practice*, 5 Business Litigation, §57:29.)

In *Fresno Loan & Thrift v. Roberts*, *supra*, defendants bought a water conditioner from L Co., which assigned the installment purchase contract to plaintiff. In plaintiff's suit, judgment for the full amount (cash price \$ 500, time price charge \$ 150, and \$ 100 attorneys' fees) was affirmed. The defense was that, in addition to the retail installment contract, there was a prior "purchase agreement" with a "customer advertising agreement" on its reverse side. *Held*, although C.C. 1803.2 (*supra*, §272) was violated, under C.C. 1812.7 the assignee is exonerated from any penalties if, as here, it was without knowledge of noncompliance when it acquired the contract. (207 *C.A.2d Supp.* 901.)

Defendants' additional contention that the penalty provisions of the Unruh Act are not exclusive and that the general rule of invalidity of an illegal contract should be applied was rejected. Unlike the statute regulating sales of automobiles (*supra*, §256), the Unruh Act excludes penalties against an innocent assignee and also limits penalties to the differential, etc.; suit for the principal of the debt is not barred. (207 *C.A.2d Supp.* 902.)

In 1963, subsequent to the *Fresno Loan* decision, C.C. 1804.2 was amended to make it clear that assignment does not cut off equities and defenses (see *supra*, §281). The conclusion of the court, that "the illegality here shown does not render the contract unenforceable" (207 *C.A.2d Supp.* 903) is therefore no longer correct, except as to negotiable instruments. (On assignee's recourse against seller for liability incurred to buyer on account of latter's equities or defenses, see *supra*, §281.)

(3) *Wilful Violation Respecting Add-On Sales.* If there is a wilful violation of the provisions governing add-on sales (see C.C. 1808.1 et seq.), the buyer is entitled to recover three times the total of finance and other charges imposed. The seller is barred from recovery of any such charges. (C.C. 1812.9; see 7 *U.C.L.A. L. Rev.* 765; Cal. Civil Practice, 5 Business Litigation, §§57:29, 57:41.)

(4) *Failure To Respond to Inquiry.* A statute outside the Act provides a penalty for failure to make timely response to an inquiry about any debit or credit applicable to an obligation on a *retail installment account*. C.C. 1720 bars recovery by an obligee of any interest or finance, service, or similar charges, from the date a proper inquiry (see C.C. 1720(b)(1)) was mailed to the date of mailing the response. A response is timely if mailed within 60 days of mailing of the inquiry.

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5. Violation of Act.

b. Correction.

4 Witkin Sum. Cal. Law Sales § 288

[§ 288] Correction.

C.C. 1812.8 provides that any failure to comply with the Act may be corrected by the holder, and if so corrected cannot be the basis of recovery by the buyer. However, the right to correct and the manner of correction are subject to the following conditions:

- (1) A wilful violation cannot be corrected.
- (2) A correction that will increase the total amount owed or the amount of any payment is ineffective unless the buyer concurs in writing.
- (3) The correction must be made by delivering a corrected copy of the contract to the buyer within 30 days of execution of the original contract.
- (4) Any amount improperly collected must be credited against the buyer's indebtedness.

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5. Violation of Act.

c. Venue, Attorneys' Fees, and Costs.

4 Witkin Sum. Cal. Law Sales § 289

[§ 289] Venue, Attorneys' Fees, and Costs.

(1) *Venue*. C.C. 1812.10 specifies the counties in which an action on the contract or installment account may be tried. (See 3 *Cal. Proc.* (4th), *Actions*, §763.) Any provision in the contract by which the seller or holder is given the right to sue in some other county is invalid. (C.C. 1804.1(i); see *supra*, §277.)

(2) *Attorneys' Fees and Costs*. Attorneys' fees and costs "shall be awarded" to the prevailing party in any action on the contract or installment account, regardless of who brings it. A defendant who alleges a tender of the full amount due and deposits that sum in court is deemed the prevailing party if the allegation is found to be true. (C.C. 1811.1; see also C.C. 1810.4 [agreement by buyer under installment account for payment of attorneys' fees and costs in conformity with C.C. 1811.1]; *Morgan v. Reasor Corp.* (1968) 69 *C.2d* 881, 897, 73 *C.R.* 398, 447 *P.2d* 638, *supra*, §269 [prevailing party in action for declaratory relief entitled to fees]; *Seibert v. Sears, Roebuck & Co.* (1975) 45 *C.A.3d* 1, 22, 120 *C.R.* 233 [fees awarded defendant in declaratory relief action based on potential exposure to subsequent class action for damages]; *Winters v. Security Pac. Nat. Bank* (1975) 49 *C.A.3d* 510, 515, 122 *C.R.* 619 [fees cannot be denied on ground that prevailing party is represented by Legal Aid attorneys]; *Joseph Magnin Co. v. Schmidt* (1978) 89 *C.A.3d* Supp. 7, 13, 152 *C.R.* 523 [tender of amount after complaint filed does not defeat right to fees].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Venue*.

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §845.



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D. Home Improvement and Swimming Pool Contracts.
1. Nature and Scope of Statute.

4 Witkin Sum. Cal. Law Sales § 290

[§ 290] Nature and Scope of Statute.

(1) *In General.* *B. & P.C. 7150* et seq. place a number of restrictions on "home improvement contracts," as defined in *B. & P.C. 7151.2*. The statutes require salespersons to be registered (*B. & P.C. 7153* et seq.), specify that contracts must be in writing (*B. & P.C. 7159*), and set forth provisions that must be included (*B. & P.C. 7159.1* et seq.). Before work is started, the contractor must give the buyer a copy of the contract signed and dated by both the contractor and the buyer. "The buyer's receipt of the copy triggers the buyer's rights under the Home Solicitation Act, if the right to cancel is applicable, provided that the contract complies with the Home Solicitation Act." (*B. & P.C. 7159(d)*); on Home Solicitation Act, see *infra*, §329; see also 7 *Pacific L. J.* 346.) Provisions relating to swimming pool construction contracts, which were formerly part of a separate statutory scheme, were incorporated into *B. & P.C. 7150* et seq. in 1991. (See *infra*, §293.)

(2) *Salespersons Covered.* A "home improvement salesperson" is a person employed by a licensed home improvement contractor "to solicit, sell, negotiate, or execute contracts for home improvements, for the sale, installation or furnishing of home improvement goods or services, or of swimming pools, spas, or hot tubs." (*B. & P.C. 7152(a)*); on swimming pool contracts, see *infra*, §293.) *Excluded* are officers of licensed corporations; qualifying persons as defined in *B. & P.C. 7068*; store sales personnel; persons who schedule appointments for home improvement salespersons; and repairpersons who are employed by licensed contractors and whose repair or service call is limited to the service or repair initially requested by the buyer. (*B. & P.C. 7152(b)*.) (See *Handyman Connection of Sacramento v. Sands (2004) 123 C.A.4th 867, 888, 20 C.R.3d 727* [contractor was properly cited for employing unregistered home improvement salesperson; neither exception for qualifying persons nor exception for service repairpersons applied]; 5 *Pacific L. J.* 243; 11 *Pacific L. J.* 388.)

(3) *Goods or Services Are Not Covered.* "Home improvement goods or services" are goods and services as defined in C.C. 1689.5 (*infra*, §329) "which are bought in connection with the improvement of real property." They include carpeting, texture coating, fencing, air conditioning or heating equipment, and termite extermination. Also included are "goods which are to be so affixed to real property as to become a part of real property whether or not severable therefrom." (*B. & P.C. 7151*.)

(4) *Service and Repair Contracts.* C.C. 7159 and certain of the provisions setting forth what information must be included in a contract (C.C. 7159.3-7159.6) do not apply to service and repair contracts, as defined in C.C. 7159.10.

(C.C. 7159.) Those contracts are subject to their own requirements. (See C.C. 7159.11 et seq.)

(5) *Applicability of Unruh Act.* All home solicitation contracts that provide for a lien on real property are subject to the provisions of the Unruh Act. (C.C. 1689.8; see *supra*, §263 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* As extensively amended in 2005 and 2007, *B. & P.C. 7159* "identifies the projects for which a home improvement contract is required, outlines the contract requirements and lists the items that shall be included in the contract, or may be provided as an attachment." (*B. & P.C. 7159(a)(1)*.) The amended statute requires the contract, and any changes, to be in writing. (*B. & P.C. 7159(c)*, (*d*).) Additionally, under *B. & P.C. 7159(e)*, the following notices must be provided to the owner as part of the contract form or, "if otherwise authorized under this subdivision ... as an attachment to the contract":

- (a) Notice concerning general liability insurance.
- (b) Notice concerning workers' compensation insurance.
- (c) Notice concerning extra or change-order work.
- (d) "Mechanics' Lien Warning" in a prescribed form.
- (e) Information about the Contractors' State License Board in a prescribed form.
- (f) Notices concerning the 3-day and 7-day right to cancel.

Certain of the information and notice requirements do not apply to a contractor furnishing a bond or bond equivalent. (See *B. & P.C. 7159(d)*, (*e*), *7159.5(a)(8)*.)

See C.E.B., Professional Licensing, Chap. 13.(2) *Salespersons Covered.* *B. & P.C. 7152(b)* was amended in 2006 to add to the list of exempted persons a general partner listed on the license record of a partnership licensed under *B. & P.C. 7000* et seq. Under *B. & P.C. 7152(c)*, added in 2006, the exemptions relating to officers of licensed corporations, general partners of licensed partnerships, and qualifying persons as defined in *B. & P.C. 7068* "apply only to those individuals who, at the time of the sales transaction, are listed as personnel of record for the licensee responsible for soliciting, negotiating, or contracting for a service or improvement" subject to *B. & P.C. 7150* et seq.

(4) *Service and Repair Contracts.* *B. & P.C. 7159* was extensively amended in 2005. Under *B. & P.C. 7159(a)(2)*, *B. & P.C. 7159* does not apply to service and repair contracts that are subject to *B. & P.C. 7159.10*, provided the contract for the applicable services complies with *B. & P.C. 7159.10-7159.14*.(6) *(New) Fire Alarms.* *B. & P.C. 7159* does not apply to the sale, installation, and servicing of a fire alarm sold in conjunction with a fire alarm system, provided that the costs attributable to making the system operable, including sale and installation costs, are \$ 500 or less and the licensee complies with *B. & P.C. 7159.9*. (*B. & P.C. 7159(a)(3)*, added in 2006.) *B. & P.C. 7159.9*, also added in 2006, sets forth the contract and certification requirements which, if met, will excuse compliance with *B. & P.C. 7159*. *Correction:* Page 259, last paragraph, all references to the Civil Code should be to the Business and Professions Code.



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CHAPTER V - Sales

Witkin Summary of California Law
X. SPECIAL STATUTES REGULATING SALES
D. Home Improvement and Swimming Pool Contracts.
2. Where Loan Is Necessary.

4 Witkin Sum. Cal. Law Sales § 291

[§ 291] Where Loan Is Necessary.

(1) *Enforceability of Contract.* If the contractor provides financing, assists the buyer in obtaining a loan, refers the buyer to a lender, or if obtaining a loan is a condition precedent to the contract, the contract is unenforceable against the buyer unless (a) the third party, if any, agrees to make the loan; (b) the buyer agrees to accept the loan or financing; and (c) the buyer does not rescind the loan or financing within the rescission period. (*B. & P.C. 7163(a).*) (On loans for swimming pool construction, see *infra*, §293.)

Until these requirements are satisfied, a contractor may not perform any services (other than obtaining building permits or similar preliminary services for which no mechanic's lien can be claimed), deliver any property, or represent in any manner that the contract is enforceable or that the buyer has any obligation. (*B. & P.C. 7163(b)* [violation renders contract unenforceable]; see *B. & P.C. 7163(c)* [return of consideration to buyer where contract is unenforceable under *B. & P.C. 7163(a), (b)*]; *B. & P.C. 7163(d)* [conditions under which buyer may retain services or property provided pursuant to contract that is unenforceable under *B. & P.C. 7163(a), (b)*].)

(2) *Waiver.* Any waiver of the provisions of *B. & P.C. 7163* is void and unenforceable. However, the buyer may waive *B. & P.C. 7163(a), (b)*, *supra*, where the contract is for emergency repairs or services that are necessary for the immediate protection of persons or property. This waiver must be in a dated written statement that describes the emergency, states that the contractor has informed the buyer of *B. & P.C. 7163(a), (b)* and that the buyer waives those provisions, and is signed by each owner of the property. Waivers made on printed forms are void and unenforceable. (*B. & P.C. 7163(g).*)

(3) *Remedies Cumulative.* The rights and remedies provided by *B. & P.C. 7163* are nonexclusive and cumulative to all rights and remedies under other laws. (*B. & P.C. 7163(f).*)

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SUPPLEMENT: [This section is current through the latest supplement]



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3. Real Property Security.

4 Witkin Sum. Cal. Law Sales § 292

[§ 292] Real Property Security.

Any contract for the sale of home improvement goods or services offered by door-to-door sale that is secured by a real property lien must contain a specified warning to the buyer regarding the use of a home as security. (*B. & P.C. 7159.1.*)

Where the contract is for \$ 5,000 or less, it may not provide for a real property security interest, "except for a mechanic's lien or other interest in property that arises by operation of law." Further, when the proceeds of a loan secured by a mortgage on real property are used to fund goods or services under a home improvement or services contract of more than \$ 5,000, the person making the loan must pay the contractor by specified methods. A person or entity who violates these requirements may be liable for actual damages, and, in addition, for three times the contract price where the violation is intentional or engaged in as part of a pattern or practice. An injured party who is a senior citizen or disabled person may additionally recover up to \$ 5,000. (*B. & P.C. 7159.2.*)

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4. Swimming Pools.

4 Witkin Sum. Cal. Law Sales § 293

[§ 293] Swimming Pools.

Swimming pool construction contracts are generally covered by *B. & P.C. 7150* et seq., but they are also subject to the following special provisions:

(1) *Contract Financed by Third-Party Lender.* *B. & P.C. 7165* provides that its requirements may be substituted for the requirements of *B. & P.C. 7163(a)* if the contract is to be financed by a third-party lender and if certain conditions are met, including that (a) the lender agree in writing to provide financing for the maximum estimated construction cost, (b) the lender provide the buyer with a written copy of the terms and conditions of the loan, and (c) the lender agree in writing to additional specified conditions. Once the buyer has acknowledged receipt of the required writings, the buyer must, within 3 business days, request by means of a prescribed form that the contractor begin performance prior to the expiration of any rescission period applicable to the loan.

(2) *Noncomplying Contracts.* A swimming pool construction contract that does not comply with the applicable provisions of *B. & P.C. 7159* (supra, §290) "shall be void and unenforceable by the contractor as contrary to public policy." (*B. & P.C. 7167.*)

(3) *Attorneys' Fees.* In an action between a person contracting for construction of a swimming pool and a swimming pool contractor arising out of their contract, "the court shall award reasonable attorney's fees to the prevailing party." (*B. & P.C. 7168.*)

B. & P.C. 7150 et seq. are inapplicable to contracts for the construction of swimming pools that are: (1) "built for the use and enjoyment of other than a single-family unit upon or contiguous to premises occupied only by a single-family unit," or (2) "built as part of an original building plan by the same contractor who builds a single-family dwelling unit on the premises." (*B. & P.C. 7166.*)

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5. Enforcement of Contract Violating Statute.

4 Witkin Sum. Cal. Law Sales § 294

[§ 294] Enforcement of Contract Violating Statute.

In *Asdourian v. Araj* (1985) 38 C.3d 276, 211 C.R. 703, 696 P.2d 95, plaintiff contractor performed residential remodeling work under an oral contract, in violation of B. & P.C. 7159 (supra, §290). The court nevertheless held that he was entitled to recover the reasonable value of the work and materials.

(a) The agreements came within the statutory definitions (supra, §290), and the statute, with its misdemeanor sanction, applied. But violation of a regulatory statute does not necessarily make the illegal agreement *void*. (38 C.3d 291.) In compelling cases, an illegal agreement may be enforced in order to avoid unjust enrichment of a defendant and a disproportionately harsh penalty on the plaintiff. (38 C.3d 292, citing *Southfield v. Barrett* (1970) 13 C.A.3d 290, 91 C.R. 514, 1 Summary (10th), *Contracts*, §442.)

(b) The following factors support the conclusion that the agreements should be enforced:

(1) The purpose of the statute is to protect unsophisticated consumers; but defendant real estate investors are not members of the class entitled to protection. In this situation the misdemeanor penalties should be sufficient; it will not defeat the statutory policy to permit recovery of the reasonable value of the work performed. (38 C.3d 292.)

(2) A contract made in violation of section 7159 is not *malum in se* or "intrinsically illegal"; "the contracts were *malum prohibitum*, and hence only *voidable* depending on the factual context and the public policies involved." (38 C.3d 293, citing *Vitek v. Alvarado Ice Palace* (1973) 34 C.A.3d 586, 110 C.R. 86.)

(3) Defendants and plaintiff were friends who had prior business dealings; defendants were not unsophisticated home owners or tenants; defendants accepted the benefits of full performance, and would be unjustly enriched if plaintiff were not compensated. (38 C.3d 293.) *Calwood Structures v. Herskovic* (1980) 105 C.A.3d 519, 522, 164 C.R. 463, upholding recovery under B. & P.C. 7159 despite lack of a written agreement, is in point and persuasive. (38 C.3d 293.)

The dissenting justice strongly disagreed: "It is inconceivable to me that a contract, specifically made illegal by the Legislature, can be enforced civilly on a theory that a civil judgment 'does not defeat the policy of the statute.' " (38 C.3d 295.) (See *Davenport & Co. v. Spieker* (1988) 197 C.A.3d 566, 569, 242 C.R. 911 [following *Asdourian*;

contractor's noncompliance with *B. & P.C. 7159* did not preclude recovery for work performed pursuant to homeowners' oral change orders].)

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4 Witkin Sum. Cal. Law Sales § 295

[§ 295] Consumer Affairs Act.

(1) *In General.* The Consumer Affairs Act (*B. & P.C. 300 et seq.*) establishes a Department of Consumer Affairs "to promote and protect the interests of the people as consumers" (*B. & P.C. 301*). The Department is under the supervision of a Director (*B. & P.C. 305*) who reports annually to the Governor and the Legislature (*B. & P.C. 312*).

A Uniform Consumer Sales Practices Act was approved in 1970 and amended in 1971; it has been adopted in three jurisdictions. (See 7A:I U.L.A. (Master Ed.), p. 201; and see 63 *A.L.R.5th* 1 [who is "consumer" within meaning of deceptive trade practice and consumer protection acts].)

(2) *Power and Duties of Director.* The broad powers and duties of the Director are enumerated in *B. & P.C. 310*, and include recommending legislation to protect consumer interests, developing consumer education programs, and maintaining contact with consumer groups. In addition, the Director must evaluate the consumer programs of each state agency as part of the annual report (*B. & P.C. 312*), and provide a comprehensive library and published bibliography on consumer affairs (*B. & P.C. 313, 313.5*). The Director must also receive and act upon consumer complaints concerning (a) unfair competition, (b) unfair or deceptive acts or practices, (c) the production, distribution, sale, or lease of goods or services that may endanger the public, (d) violations of the code or regulations relating to licensed businesses and professions, or (e) other appropriate matters. (*B. & P.C. 325, 326*.)

(3) *Proceedings.* The Director may intervene in administrative or judicial proceedings that may substantially affect consumer interests (*B. & P.C. 320*), or commence proceedings to enjoin violations of law that may damage consumer interests (*B. & P.C. 321*). The Attorney General may also intervene in or commence administrative or judicial proceedings that may substantially affect consumer interests. (*B. & P.C. 320, 321*; see 7 *Pacific L. J.* 544.)

(4) *Powers of Boards.* The boards within the Department of Consumer Affairs charged with licensing various businesses and professions are empowered to obtain court orders enjoining statutory violations within the particular board's jurisdiction and requiring restitution to persons injured by the violation. (*B. & P.C. 125.5*; see 4 *Pacific L. J.* 341; 5 *Pacific L. J.* 317.) (See also *B. & P.C. 125.7* and *125.8*, authorizing orders restraining violators from engaging in their licensed businesses or professions.)

West's Key Number Digest, Consumer Protection k.2

SUPPLEMENT: [This section is current through the latest supplement]



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E. Consumer Protection Laws.
2. Consumers Legal Remedies Act.

4 Witkin Sum. Cal. Law Sales § 296

[§ 296] Consumers Legal Remedies Act.

(1) *In General.* The Consumers Legal Remedies Act (C.C. 1750 et seq.) enables a consumer to bring a class action on behalf of himself or herself and other consumers similarly situated if the consumer has suffered "any damage" from the use or employment of a "method, act, or practice" made unlawful by the Act. (C.C. 1780(a), 1781(a).) (See *Kagan v. Gibraltar Savings & Loan Assn.* (1984) 35 C.3d 582, 592, 595, 200 C.R. 38, 676 P.2d 1060, 4 Cal. Proc. (4th), *Pleading*, §268 [customer was not precluded from bringing class action against savings and loan association by fact that association had rectified customer's individual complaint]; *Broughton v. Cigna Healthplans of Calif.* (1999) 21 C.4th 1066, 1079, 1080, 90 C.R.2d 334, 988 P.2d 67, 6 Cal. Proc. (4th), *Proceedings Without Trial*, Supp., §484A [insureds' claim against health insurer was not subject to mandatory arbitration clause in insurance plan to extent that they sought injunctive relief for deceptive advertising under C.C. 1750 et seq.]; *Cruz v. PacificCare Health Systems* (2003) 30 C.4th 303, 311, 133 C.R.2d 58, 66 P.3d 1157, 6 Cal. Proc. (4th), *Proceedings Without Trial*, Supp., §484A [following *Broughton*]; *Outboard Marine Corp. v. Superior Court* (1975) 52 C.A.3d 30, 36, 124 C.R. 852 [pleading requirements]; *America Online v. Superior Court* (2001) 90 C.A.4th 1, 10, 108 C.R.2d 699, 2 Cal. Proc. (4th), *Jurisdiction*, Supp., §347 [in light of Act's antiwaiver provision (C.C. 1751), trial judge properly placed burden on defendant Internet service provider to prove that enforcement of clause requiring subscribers to bring action in Virginia would not result in diminution of consumer rights]; *Wang v. Massey Chevrolet* (2002) 97 C.A.4th 856, 870, 118 C.R.2d 770 [parol evidence rule does not constitute bar or defense to action alleging violation of C.C. 1770(a)(14) (false representation as to rights, remedies, or obligations conferred by or involved in transaction); statute contemplates existence of collateral promises, and Legislature could not have intended to preclude proof of them]; *LaChapelle v. Toyota Motor Credit Corp.* (2002) 102 C.A.4th 977, 991, 126 C.R.2d 32, 13 Summary (10th), *Personal Property*, §194 [in action by lessee of automobile against dealer and financing agency, dealer's allegedly deceptive conduct in violation of Act was not imputable to agency, even though agency supplied dealer with form lease agreement]; *Bescos v. Bank of America* (2003) 105 C.A.4th 378, 395, 396, 129 C.R.2d 423 [following *LaChapelle*]; *Consumer Advocates v. Echostar Satellite Corp.* (2003) 113 C.A.4th 1351, 1360, 8 C.R.3d 22 [in determining whether satellite television service providers made false or misleading statements in their brochures within meaning of Act, trial judge properly applied reasonable consumer standard]; *Kramer v. Intuit* (2004) 121 C.A.4th 574, 581, 18 C.R.3d 412 [computer software company's rebate program did not violate C.C. 1770(a)(17), prohibiting offering of rebate contingent on "event to occur subsequent to the consummation of the transaction," where customer had three options for obtaining rebate, only one of which required purchase of second product subsequent to purchase of first]; 10 Cal. Western L. Rev. 161 [overview of Act]; 6 *Loyola L.A. L. Rev.*

312 [private and public remedies for fraudulent business practices]; 25 *Loyola L.A. L. Rev.* 127 [whether investment securities are goods or services under Act]; 2 *Pacific L. J.* 1 [analysis of Act]; 14 Santa Clara Lawyer 555 [Law Enforcement's Role in Consumer Protection]; 18 *U.C.L.A. L. Rev.* 592 [criticizing federal consumer class action as remedy for relief against deceptive advertising]; 59 *A.L.R.3d* 1222 [validity of statutory grant of power to state to seek restitution of fruits of consumer fraud]; 62 *A.L.R.3d* 169 [right to private action under state consumer protection act]; 18 *A.L.R.4th* 824 [finance company's liability in connection with consumer fraud practices of third-party seller of goods or services]; Cal. Civil Practice, 5 Business Litigation, §51:1 et seq.; on procedural requirements under the Act, see 4 *Cal. Proc.* (4th), Pleading, §268.)

In *Massachusetts Mut. Life Ins. Co. v. Superior Court* (2002) 97 C.A.4th 1282, 119 C.R.2d 190, an action arising from defendant insurer's practices in selling "vanishing premium" policies, defendant argued that the requirement of C.C. 1780(a) that the plaintiff have suffered damage made the action unsuitable for class treatment. The trial judge granted class certification. *Held*, petition for extraordinary relief denied. Causation as to each class member is ordinarily proved more likely than not through a showing of materiality. (97 C.A.4th 1292.) If plaintiffs could show that defendant failed to disclose its own concerns about the policies and that those concerns would have been material to any reasonable person contemplating the purchase of such a policy, "the purchases common to each class member would in turn be sufficient to give rise to the inference of common reliance on representations which were materially deficient." (97 C.A.4th 1293.)

(2) *Unconscionable Contracts*. In 1979, the Legislature declared its intent "to preserve inviolate the rights of consumers and homeowners to remain free from unconscionable fraudulent and deceptive sales practices." (Stats. 1979, Chap. 819, §1.) Accordingly, C.C. 1670.5 was enacted, authorizing courts to refuse enforcement of any unconscionable contract or clause (see 1 *Summary* (10th), *Contracts*, §330); and C.C. 1770, which defines prohibited deceptive acts for purposes of the Consumers Legal Remedies Act, was amended to cover the insertion of "an unconscionable provision" in any consumer contract for the sale or lease of goods or services. (See 42 *A.L.R.4th* 293 [what constitutes unconscionable agreement or conduct under state consumer credit protection act].)

In *Truta v. Avis Rent A Car System* (1987) 193 C.A.3d 802, 238 C.R. 806, plaintiff brought a class action against defendants, four car rental companies, challenging the payment of a collision damage waiver (CDW) by persons renting automobiles. Plaintiff alleged that the CDW was essentially uniform for all car rentals in the state, and provided that, for a fee of \$ 6 per day, defendants would pay up to \$ 1,000 for collision or upset damage or loss. Plaintiff's complaint further alleged that the CDW was unconscionable, but defendants demurred on the basis that unconscionability could only be raised as a defense to enforcement of a contract, and was not grounds for affirmative relief. The trial judge sustained the demurrer. *Held*, reversed. Plaintiff contended that (a) the price charged for the CDW was unreasonably high due to the absence of competition--each defendant was the sole supplier of the CDW for its own rentals; and (b) the rental contract was one of adhesion in view of defendants' superior bargaining position and the nonnegotiable nature of the contract terms. Thus, plaintiff's allegations were sufficient to raise a claim of substantive and procedural unconscionability in violation of C.C. 1770. (193 C.A.3d 821.) (See *Freeman v. Wal-Mart Stores* (2003) 111 C.A.4th 660, 668, 669, 3 C.R.3d 860 [terms of store's shopping card, i.e., if card was not used within 2 years, monthly fee of \$ 1 was deducted from value until card was used or no longer had any value, were not unconscionable within meaning of C.C. 1670.5, 1770].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *Pollard v. Ericsson* (2004) 125 C.A.4th 214, 220, 22 C.R.3d 496 [cell phone companies did not violate C.C. 1770(a)(17) in selling phones with rebates conditioned on extension or acquisition of wireless service contract with another company, where rebate offers could be satisfied by earlier or simultaneous purchase of required contract; following *Kramer v. Intuit* (2004) 121 C.A.4th 574, 18 C.R.3d 412, text, p. 265]; *Schauer v. Mandarin Gems of Calif.* (2005) 125 C.A.4th 949, 960, 23 C.R.3d 233 [in action against jewelry store, plaintiff, who acquired diamond ring as engagement gift prior to marriage and alleged ring was not worth what her former husband paid for it, was not consumer within meaning of Act, as she did not acquire ring by purchase or lease; without assignment from husband,

she was without remedy under Act]; *Colgan v. Leatherman Tool Group* (2006) 135 C.A.4th 663, 680, 682, 38 C.R.3d 36 [standards used to determine whether representation is misleading under false advertising law (see 13 Summary (10th), *Equity*, §109) apply equally to claims under C.C. 1770(a)(4); use of "Made in U.S.A." in connection with product, most of components of which were manufactured abroad, violated both laws]; *Bardin v. DaimlerChrysler Corp.* (2006) 136 C.A.4th 1255, 1276, 39 C.R.3d 634, 13 Summary (10th), *Equity*, Supp., §§107, 123 [consumers failed to state cause of action against defendant automobile manufacturer for misrepresentation under C.C. 1770(a), where, although defendant used tubular steel in exhaust manifolds of its vehicles, rather than more expensive and durable cast iron, it made no representations about composition of manifolds]; *McKell v. Washington Mut.* (2006) 142 C.A.4th 1457, 1488, 49 C.R.3d 227 [in class action against banks, plaintiffs failed to state cause of action for unfair competition and unfair or deceptive practices in connection with home loans under C.C. 1770(a); that subdivision applies to transactions intended to result in sale or lease of goods or services, but defendants' challenged practices related to actions resulting in sale of real property]; *Aron v. U-Haul Co. of Calif.* (2006) 143 C.A.4th 796, 807, 49 C.R.3d 555 [in consumer class action against truck rental company, plaintiffs failed to state cause of action under C.C. 1770(a)(4), which prohibits use of deceptive representations or designations of geographic origin; defendant's alleged use of deceptive representations in connection with its \$ 20 fueling fee did not relate to geographic origin]; *Belton v. Comcast Cable Holdings, LLC* (2007) 151 C.A.4th 1224, 1245, 60 C.R.3d 631 [cable service provider's requirement that customers purchase basic tier of cable service in order to get music or FM service was not unconscionable within meaning of C.C. 1770(a)(19) and did not constitute negative option billing or discrimination against visually impaired subscribers in violation of C.C. 1770(a)(14)]; *Benson v. Kwikset Corp.* (2007) 152 C.A.4th 1254, 1274, 62 C.R.3d 284 [in determining that defendant's use of "Made in U.S.A." label violated C.C. 1770(a)(4), trial judge applied appropriate standard, under which labeling must be viewed from perspective of consumers for whom geographic designation is important, but must be done so "reasonably"]; *Berryman v. Merit Property Management* (2007) 152 C.A.4th 1544, 1557, 62 C.R.3d 177 [in action against manager of residential common interest developments alleging that defendant wrongfully charged fees in connection with transfer of title for home purchases, plaintiffs failed to state cause of action under Act; transactions did not involve "sale or lease of goods or services to any consumer" within meaning of C.C. 1770(a)]; *Buckland v. Threshold Enterprises, Ltd.* (2007) 155 C.A.4th 798, 809, 66 C.R.3d 543 [plaintiff failed to state claims under C.C. 1770(a)(5) and 1770(a)(7) based on alleged misrepresentations in packaging and advertising, where she admitted that she suspected packaging and advertising were fraudulent and purchased product as potential target of litigation; actual reliance is element of action under Act sounding in fraud]; *Bourgi v. West Covina Motors* (2008) 166 C.A.4th 1649, 1660, 83 C.R.3d 758 [in action under C.C. 1770(a)(6) (representation, as new, good that is deteriorated unreasonably, or altered or secondhand) arising from sale of automobile, trial judge erred in failing to instruct on *Veh.C.* 9990, 9991 (limitation on when damage must be disclosed), which, read together with C.C. 1770(a)(6), create safe harbor provision for minor repaired damage]; C.E.B., Law of Contracts §6.23; 28 California Lawyer 43 (June 2008) [Handling Claims under the CLRA].

Kagan v. Gibraltar Savings & Loan Assn.:

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §302.

Broughton v. Cigna Healthplans of Calif.:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §500.

Cruz v. PacifiCare Health Systems:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §500.

America Online v. Superior Court:

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §356. *Procedural requirements:*

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §302.

(New) *Fraudulent omissions*: Although "a claim may be stated under the CLRA in terms constituting fraudulent omissions, to be actionable the omission must be contrary to a representation actually made by the defendant, or an omission of a fact the defendant was obliged to disclose." (*Daugherty v. American Honda Motor Co. (2006) 144 C.A.4th 824, 834, 835, 51 C.R.3d 118* [in action against automobile manufacturer, plaintiffs failed to state claim under Act based on allegations that their automobiles had latent defect that resulted or could result in malfunction beyond warranty period; automobiles functioned as represented throughout warranty period].)

(New) *Distinction: Extension of credit is excluded*: The extension of credit, "such as issuing a credit card, separate and apart from the sale or lease of any specific goods or services, does not fall within the scope of the act." (*Berry v. American Express Publishing (2007) 147 C.A.4th 224, 227, 54 C.R.3d 91* [action charging that arbitration clause and class action waiver contained in cardholder agreement violated Act was properly dismissed]; *Ball v. FleetBoston Financial Corp. (2008) 164 C.A.4th 794, 800, 79 C.R.3d 402* [cause of action seeking judicial declaration regarding same credit card provisions at issue in *Berry* was not viable, as it was wholly derivative of cause of action for violation of Act].)

(1a) (New) *Standing Requirement*. In *Meyer v. Sprint Spectrum L.P. (2009) 45 C.4th 634, 88 C.R.3d 859, 200 P.3d 295*, plaintiff customers brought an action against a cellular telephone company alleging that an arbitration clause and other remedial provisions in defendant's contract with them were unconscionable. The trial judge sustained defendant's demurrer, finding that plaintiffs lacked standing because they had not alleged that they had been personally damaged or that defendant had attempted to enforce any of the provisions at issue against them. The Court of Appeal affirmed, agreeing that plaintiffs lacked standing. *Held*, judgment of the Court of Appeal affirmed.

(a) C.C. 1780(a), which identifies those who may seek relief under the Act, imposes the requirement of suffering "any damage." While "any damage" is broader than "actual damages"--it could include, for example, certain types of transaction costs and opportunity costs--it denotes "some type of increased costs, as a result of the unconscionable terms in order to have standing." (*45 C.4th 641, 643, footnote 3, disapproving dictum in Kagan v. Gibraltar Savings & Loan Assn. (1984) 35 C.3d 582, 200 C.R. 38, 676 P.2d 1060, text, p. 264, to the effect that "any damage" may include "the infringement of any legal right" as defined in C.C. 1770.*) "Although the allegedly unconscionable terms may at some future time require plaintiffs to expend greater costs and legal fees should a dispute arise that requires arbitration or resort to other remedial provisions, it would contort the statutory language to conclude that the preemptive expenditure of fees for this litigation means that [defendant's] alleged unlawful practices had caused 'damage' at the time the lawsuit was filed." (*45 C.4th 643.*)

(b) C.C. 1782(d) relieves a plaintiff of certain procedural requirements where only injunctive relief is sought, and here that is all plaintiffs seek. C.C. 1780, however, remains the only section of the Act that sets forth the available remedies, including injunctive relief, so its requirement of "damage" remains applicable no matter how plaintiffs may have limited the relief they seek. (*45 C.4th 644.*) Neither can plaintiffs escape the damage requirement through their interpretation of the Act's limitations statute, C.C. 1783, which refers to "the date of the commission of such method, act, or practice." Under plaintiffs' theory, the limitations period would start to run against consumers the moment their contracts were entered into, regardless of whether any of the allegedly unconscionable remedies were used against them. It is doubtful the Legislature intended this result. (*45 C.4th 645.*)

(c) Any rule that expands the ability of individuals to bring lawsuits has costs as well as benefits. In weighing those costs and benefits, the Legislature, in drafting the Act, set a "low but nonetheless palpable threshold of damage," and did not want lawsuit costs to be incurred when no damage could yet be demonstrated. (*45 C.4th 646, citing Californians for Disability Rights v. Mervyn's, LLC (2006) 39 C.4th 223, 46 C.R.3d 57, 138 P.3d 207, 13 Summary (10th), Equity, Supp., §124, for its discussion of the analogous rule imposed by Proposition 64.*)



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E. Consumer Protection Laws.
3. Consumer Credit Reporting Agencies Act.
a. Nature and Scope of Statute.

4 Witkin Sum. Cal. Law Sales § 297

[§ 297] Nature and Scope of Statute.

(1) *Former Consumer Credit Reporting Act.* Former C.C. 1750 et seq., the Consumer Credit Reporting Act, was enacted in 1970. The Act provided a method by which a consumer could obtain information contained in his or her credit file and dispute or correct inaccuracies. (See 2 *Pacific L. J.* 635; 4 *Golden Gate L. Rev.* 47.)

(2) *Consumer Credit Reporting Agencies Act.* In 1975, the former Act was superseded by the more comprehensive Consumer Credit Reporting Agencies Act (C.C. 1785.1 et seq.). (See 7 *Pacific L. J.* 347; 24 *U.C.L.A. L. Rev.* 115.) The Act regulates the contents and disclosure of any "consumer credit report," defined generally as a communication by a consumer credit reporting agency bearing on the creditworthiness, standing, or capacity of a consumer to be used in establishing the consumer's eligibility for (a) credit for personal, family, or household purposes; (b) employment; (c) hiring of a dwelling unit (see 14 *Pacific L. J.* 532); or (d) other purposes authorized in C.C. 1785.11 (e.g., licenses, insurance). (C.C. 1785.3(c).) (See *Gomon v. TRW* (1994) 28 *C.A.4th* 1161, 1167, 34 *C.R.2d* 256 [address or employment information that has no bearing on consumer's credit is not consumer credit report].)

A "consumer" is a natural individual (C.C. 1785.3(b)), and a "consumer credit reporting agency" means a private or governmental entity that for compensation or on a cooperative nonprofit basis regularly prepares information for furnishing consumer credit reports to third parties, but does not include governmental agencies primarily concerned with traffic safety, law enforcement, or licensing (C.C. 1785.3(d)). The Act does not apply to licensed private investigators (C.C. 1785.4), or to reports limited to disclosures from public records of land and land titles (C.C. 1785.35). (See C.C. 1785.5 [persons who regularly engage in assembling, evaluating, or disseminating information on checking account experiences of consumer customers of banks and other financial institutions are subject to Act]; Cal. Civil Practice, 5 Business Litigation, §56:1 et seq.; Cal. Transactions Forms, 5 Business Transactions §32:117 et seq.)

The provisions of the Act may not be waived. (C.C. 1785.36.)

(3) *Federal Act and Other State Acts.* The state Consumer Credit Reporting Agencies Act built upon the provisions of the similar federal Fair Credit Reporting Act. (15 *U.S.C.*, §1681 et seq.) (See generally *Emerson v. J.F. Shea Co.* (1978) 76 *C.A.3d* 579, 595, 143 *C.R.* 170; *Gomon v. TRW*, *supra*, 28 *C.A.4th* 1173 [state Act does not conflict with federal Act by allowing attorneys' fees for prevailing defendant even though federal Act allows fees for prevailing

plaintiffs only]; 26 *Hastings L. J.* 1219 [comparing federal Act with proposed California Consumer Reporting Agencies Act]; 10 *Loyola L.A. L. Rev.* 409; 14 Santa Clara Lawyer 459; Cal. Transactions Forms, 5 Business Transactions §32:43 et seq.; 44 Proof of Facts 3d 287 [proof of violation of federal Act and resultant damage].)

A number of other states have also attempted to regulate credit reporting, and the federal Act, which was not intended to discourage state regulatory action, provides that federal law takes precedence over a state law only when the two are inconsistent. (15 U.S.C., §1681t; see 24 *U.C.L.A. L. Rev.* 83 [preemption of state credit reporting legislation]; on state regulation generally, see 15A *Am.Jur.2d* (2000 ed.), *Collection and Credit Agencies* §3 et seq.; 12 *A.L.R.4th* 294 [validity and construction of state fair credit reporting acts].)

West's Key Number Digest, Consumer Protection k.6

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Consumer Credit Reporting Agencies Act*. See *U.D. Registry v. California* (2006) 144 *C.A.4th* 405, 426, 50 *C.R.3d* 647 [C.C. 1785.11.2, allowing consumers to prevent dissemination of their credit reports, was unconstitutional as applied to credit reporting agency because it placed excessive restrictions on agency's truthful reporting of public record information].

(3) *Federal Act and Other State Acts*. See 10 *A.L.R. Fed 2d* 605 [liability in private action under Fair Credit Reporting Act]; 20 *A.L.R. Fed 2d* 509 [remedies, other than attorneys' fees, in private action under Fair Credit Reporting Act]; 21 *A.L.R. Fed 2d* 143 [recoverability of attorneys' fees and related expenses in private action under Fair Credit Reporting Act].

Federal preemption: The Consumer Credit Reporting Agencies Act allows consumers to place security alerts (C.C. 1785.11.1) and security freezes (C.C. 1785.11.2) on their files. In light of recent changes to the federal Fair Credit Reporting Act, which provides for fraud alerts and identity theft reports, these state provisions may be preempted. (See 8 *A.L.R. Fed 2d* 233; Cal. Transactions Forms, 5 Business Transactions §32:139.)



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E. Consumer Protection Laws. 3. Consumer Credit Reporting Agencies Act. b. Disclosure of Information.

4 Witkin Sum. Cal. Law Sales § 298

[§ 298] Disclosure of Information.

(1) *Consumer's Rights.* The consumer is given extensive rights, upon request and proper identification, to see the files maintained about him or her by a consumer credit reporting agency, and to be told of the sources of the information in the files and of recent recipients of reports on the consumer. (C.C. 1785.10(a), (c), (d).) When a consumer requests disclosure of file information, the agency must inform him or her of the right to receive a decoded version of the file or a written explanation of any code used and, if applicable, of the right to receive disclosure without charge pursuant to C.C. 1785.17. The consumer must also be informed of the rights conferred by C.C. 1785.11.8 (consumer's election to remove name from list that agency furnishes for credit card solicitations), C.C. 1785.19 (infra, §303), and C.C. 1785.19.5 (infra, §302). (C.C. 1785.10(b).) (See *Cisneros v. U.D. Registry* (1995) 39 C.A.4th 548, 572, 46 C.R.2d 233 [disclosure request may not come from consumer's attorney but must come from consumer personally].)

Where the consumer notifies an agency that he or she has been the victim of identity theft, the agency must provide the consumer with a statement outlining an identity theft victim's statutory rights. (C.C. 1785.15.3(a).) Where the agency receives a police report from an identity theft victim, the victim has a right to receive, free of charge, up to 12 copies of his or her file during a 12-month period, not to exceed 1 copy per month, following the date of the report. (C.C. 1785.15.3(b); on report user's obligations where identity theft appears possible, see C.C. 1785.20.3; on blocking of information appearing in report as result of identity theft, see infra, §300.)

(2) *Agency's Duty.* The agency must make information available to the consumer in person, by mail, or by telephone (C.C. 1785.15(b)), and must provide trained personnel to explain the information furnished (C.C. 1785.15(d)). (See *Gomon v. TRW* (1994) 28 C.A.4th 1161, 1172, 34 C.R.2d 256 [agency's duty to provide disclosure in "manner selected by the consumer" means that consumer may choose whether to receive disclosure in person, by mail, or by telephone].) Additionally, under C.C. 1785.15(a), the consumer has the right to request all of the following:

(a) A decoded written version of the file or a written copy of the file with an explanation of any code used.

(b) A credit score for the consumer, the key factors, and related information as defined in and required by C.C. 1785.15.1. (On *lender's* duty to provide credit score to home loan applicant, see C.C. 1785.20.2.)

(c) A record of all inquiries in connection with a credit transaction not initiated by the consumer, and received by the agency in the 12-month period immediately preceding the consumer's disclosure request.

(d) The names and addresses of the recipients of any report on the consumer that the agency has furnished for employment purposes, within the 2-year period preceding the request, or for any purposes, within the 12-month period preceding the request.

Any written disclosure to a consumer under C.C. 1785.15 must include a written summary of the consumer's rights, and under certain circumstances, a toll-free telephone number that the consumer can use to communicate with the agency. (C.C. 1785.15(f).)

An agency may under some circumstances impose a reasonable charge of no more than \$ 8 for disclosing information. (C.C. 1785.17.)

(3) *Duties of Persons Furnishing Information.* A person may not furnish information on a specific transaction or experience to any consumer credit reporting agency if the person knows or should know that the information is incomplete or inaccurate. (C.C. 1785.25(a).) Additionally, a creditor may not submit negative credit information concerning a consumer to any agency unless the creditor notifies the consumer affected. (C.C. 1785.26(b); on form and manner of notice, see C.C. 1785.26(c).) (See *Hussey-Head v. World Savings and Loan Assn.* (2003) 111 C.A.4th 773, 782, 4 C.R.3d 171 [as C.C. 1785.25, 1785.26 are not lending regulations, they are not preempted by federal law and may be enforced against federal savings association].)

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1. Contents.

4 *Witkin Sum. Cal. Law Sales* § 299

[§ 299] Contents.

An agency may furnish a report to a third person only for specified legitimate purposes. (C.C. 1785.11, 1785.12; see *Hiemstra v. TRW* (1987) 195 C.A.3d 1629, 1634, 241 C.R. 564 [agency's practice of requiring subscriber to make one-time general certification of legitimate purpose in seeking reports, which agency then kept on file, complied with C.C. 1785.11; separate certification for each requested report was unnecessary].) Reports must disclose the source of any information based on a public record (C.C. 1785.18) but may not contain certain stale information, including arrest or conviction records that antedate the report by more than 7 years (C.C. 1785.13). An agency may not report information on an unlawful detainer action unless the lessor was the prevailing party (C.C. 1785.13(a)(3)), and may not report information concerning a document acting as a lien or encumbrance (including a notice of lis pendens) where the document is accompanied by a court order striking or releasing the lien or encumbrance under C.C.P. 765.030 (C.C. 1785.135). (See *Schoendorf v. U.D. Registry* (2002) 97 C.A.4th 227, 239, 118 C.R.2d 313 [because C.C. 1785.14(b) requires "maximum possible" accuracy, report violates statute when it is misleading or incomplete, even if it provides technically accurate information from public record].)

In *U.D. Registry v. California* (1995) 34 C.A.4th 107, 40 C.R.2d 228, plaintiffs--a trade organization for residential lessors and a corporation in the business of gathering information about unlawful detainer cases and selling it to subscribers--brought an action challenging the validity of C.C. 1785.13(a)(3), *supra*. The trial judge ruled the provision unconstitutional because it prohibited the truthful reporting of publicly available information. *Held*, affirmed.

(a) The expression at issue is not commercial speech, since it does not propose a commercial transaction. "The fact that UDR sells the information does not transform it to commercial speech any more than the fact that a magazine or newspaper is sold makes its contents commercial speech." As noncommercial speech, the prohibited expression is entitled to the full measure of constitutional protection. (34 C.A.4th 110, 111.)

(b) The state has a legitimate concern in the availability of rental housing for those needing housing, and particularly for those facing eviction. But that concern "does not justify a ban on publication by credit reporting agencies of lawfully obtained truthful information contained in court records open to the perusal of everyone. The information is in the custody of the state. If the state is concerned about dissemination of this information, it has the

power to control its initial release. ... 'Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts.' " (34 C.A.4th 114, 115, quoting *The Florida Star v. B.J.F.* (1989) 491 U.S. 524, 109 S.Ct. 2603, 105 L.Ed.2d 443, 7 Summary (10th), *Constitutional Law*, §430.)

(c) Furthermore, the statute is underinclusive, in that it limits only one mode of dissemination. The restriction applies only to consumer credit reporting agencies, but the information can be disseminated in countless other ways. (34 C.A.4th 115.)

(d) The state wishes to limit the free flow of information for fear of its misuse by landlords. But such a "paternalistic approach," impermissible in the commercial speech context (see *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council* (1976) 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346, 7 Summary (10th), *Constitutional Law*, §325), is even more improper for highly protected noncommercial speech such as that restricted by C.C. 1785.13(a)(3). "The state can, and does, provide the means to 'open the channels of communication' by affording the consumer the right to dispute inaccurate information in a credit report, seek a reinvestigation of the accuracy of information, and provide a brief statement explaining any unresolved disputed information to be included in any credit report the agency issues about the consumer. ... In this way, the state's concerns regarding the effect of the information upon its recipients are served without violation of the First Amendment." (34 C.A.4th 116.) (See 24 Southwestern U. L. Rev. 1077 [criticizing the holding in *U.D. Registry*]; 44 U.C.L.A. L. Rev. 1567 [same].)

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4 Witkin Sum. Cal. Law Sales § 300

[§ 300] Correction of Inaccuracies.

(1) *In General.* If the completeness or accuracy of any item is disputed, the agency must reinvestigate within a reasonable period of time, and record the current status of the disputed information within 30 days after receiving notice of the dispute. This requirement does not apply if the agency has reasonable grounds to believe that the dispute is frivolous or irrelevant. The agency may require that disputes by customers be in writing. (C.C. 1785.16(a).) Items found to be missing, inaccurate, or incapable of verification may be remedied by addition, correction, or deletion. (C.C. 1785.16(b).) (See *Gomon v. TRW* (1994) 28 C.A.4th 1161, 1170, 1171, 34 C.R.2d 256 [address or employment inquiry that does not affect consumer's ability to obtain credit or a checking account is not "item of information" that agency has duty to reinvestigate]; *Cisneros v. U.D. Registry* (1995) 39 C.A.4th 548, 575, 579, 46 C.R.2d 233 [consumer may not be required to sign waiver of all privacy rights to financial and medical information as condition to reinvestigation, and agency must respond to reinvestigation request even if consumer claims report is misleading or incomplete rather than inaccurate].)

(2) *Demand for Reinvestigation or Correction.* The demand for reinvestigation may be made either by the consumer or by the user of the file acting on the consumer's behalf. (C.C. 1785.16, 1785.21.) Following reinvestigation, a written demand for correction may be made upon any person who furnished the disputed information to the reporting agency. (C.C. 1785.30.)

(3) *Unresolved Disputes.* If the dispute is not resolved, the consumer may file a brief statement, and either this statement or an accurate summary must be included in subsequent reports. (C.C. 1785.16(d), (f), (g).)

(4) *Notification by Agency.* Following the deletion of information or the filing of a statement setting forth the dispute, the agency must, at the request of the consumer, furnish notification of the deletion or dispute to any person specifically designated by the consumer (a) who, within 2 years prior to the deletion of information or filing of the dispute, received a report (containing the deleted or disputed information) concerning the consumer for employment purposes, or (b) who, within 12 months of the deletion or filing, received such report for any other purpose. The consumer must be advised of the right to make such a request. (C.C. 1785.16(h).)

(5) *Information Appearing as Result of Criminal Violation.* C.C. 1785.16(k), (l) establish procedures for the blocking, and, in specified circumstances, the unblocking, of information that appears in a credit report as a result of a violation of P.C. 530.5 (2 *Cal. Crim. Law (3d), Crimes Against Property, §209*), prohibiting the unauthorized use of another person's personal identifying information to obtain credit, goods, or services. (See 29 *McGeorge L. Rev.* 483.)

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3. Adverse Use of Report.

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[§ 301] Adverse Use of Report.

Adverse action based on a report must be reported by the user to the consumer together with the name, address, and telephone number of the agency making the report, a statement that the decision to take adverse action was based on information contained in the report, and written notice of the consumer's rights. (C.C. 1785.20(a).) Adverse credit or insurance action based on information from any other source must also be reported, and the nature and substance of the information must be disclosed to the consumer upon request. (C.C. 1785.20(b).) When employment is denied because of information contained in a report, the user of the report must so advise the consumer against whom the action was taken and supply the name and address of the agency making the report. (C.C. 1785.20.5.) Compliance with the requirements regarding adverse use of a report does not excuse creditors from their obligation under C.C. 1787.2 to notify credit applicants of the action taken on their application and the grounds for denial. (C.C. 1785.20(d).)

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- 4. Prohibitions as to Marketing and Resale.

4 Witkin Sum. Cal. Law Sales § 302

[§ 302] Prohibitions as to Marketing and Resale.

C.C. 1785.19.5 requires an agency, upon request and proper identification from the consumer, to create reasonable procedures to prevent a consumer credit report or information from a consumer's file from being provided to a third party *for marketing purposes or for any offer of credit not requested by the consumer*. However, the statute does not apply to the use of information by a credit grantor for purposes related to an existing credit relationship.

C.C. 1785.22 prohibits the procurement of a consumer credit report for the purpose of reselling it or any information it contains. An exception is made where the person procuring the report discloses to the issuing agency the identity of the ultimate end user, and each permissible purpose for which the report is furnished to that user. (C.C. 1785.22(a); see C.C. 1785.22(b) [person procuring report for purpose of resale must establish and comply with reasonable procedures designed to insure that report is resold only for permissible purpose].)

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4 Witkin Sum. Cal. Law Sales § 303

[§ 303] Consumer's Remedies.

(1) *Action for Damages.* The Act gives the consumer an action for damages against a reporting agency or a user of information for the negligent or wilful violation of its provisions. (C.C. 1785.31 et seq.) The statutory remedies are exclusive except as to false information furnished with malice or wilful intent. (C.C. 1785.32.) (See *Pulver v. Avco Financial Services* (1986) 182 C.A.3d 622, 633, 634, 227 C.R. 491, citing the text [C.C. 1785.31(a); right of action against "any person" permits action against credit reporting agency regardless of form under which it transacts business, but does not impose liability on mere supplier of information to agency]; *Hiemstra v. TRW* (1987) 195 C.A.3d 1629, 1635, 241 C.R. 564 [action for invasion of privacy barred by C.C. 1785.32 where no false information was furnished]; *Cisneros v. U.D. Registry* (1995) 39 C.A.4th 548, 569, 46 C.R.2d 233 [in action against corporation providing information on residential renters to landlords, trial judge erred in imposing personal liability on corporate president on basis of corporation's violation of C.C. 1785.16 (supra, §300); duties under that statute are imposed only on agency itself and there is no similar duty under common law].)

C.C. 1785.31 also authorizes injunctive relief to aggrieved applicants, and allows punitive damages, recoverable individually or in a class action, for wilful violations. Awards of attorneys' fees are restricted to "prevailing plaintiffs," except in the case of a debt collector who is sued, in bad faith, in an action related to the collection of a debt.

(2) *Action for Civil Penalty.* C.C. 1785.19 authorizes a consumer, or the person or entity responsible for the file accessed, to bring an action for a *civil penalty* not to exceed \$ 2,500 against any of the following: (a) a person who knowingly and wilfully obtains access to a file other than as provided in C.C. 1785.11 (supra, §299); (b) a person who knowingly and wilfully obtains data from a file other than as provided in C.C. 1785.11; (c) a person who uses the data received from a file in a manner contrary to an agreement with the reporting agency. (C.C. 1785.19(a).) In addition to the civil penalty, a successful plaintiff may recover costs and reasonable attorneys' fees. (C.C. 1785.19(b).) (See *Olson v. Six Rivers National Bank* (2003) 111 C.A.4th 1, 12, 3 C.R.3d 301 [bank was not liable as unauthorized user of report under C.C. 1785.19, 1785.31 based on its having obtained credit report on husband after wife applied for loan; wife's financial statement made clear that she was relying on joint or community property to establish creditworthiness, and thus husband's credit information was sought for legitimate purpose within meaning of C.C. 1785.11 (supra, §300)].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Action for Damages.* In *Trujillo v. First Amer. Registry* (2007) 157 C.A.4th 628, 68 C.R.3d 732, plaintiff tenants brought an action against defendant credit reporting agency alleging that defendant provided incomplete tenant screening reports that showed the filing of unlawful detainer actions but failed to show that the actions had been dismissed. The trial judge granted summary adjudication for defendant on plaintiffs' cause of action under the Act. *Held*, this was proper. C.C. 1785.31(a) requires the plaintiff to have suffered damage. Defendant presented evidence that, even if the screening reports had been complete, plaintiffs' rental applications would have been denied, and plaintiffs failed to offer contrary evidence. Thus, they suffered no damage. (157 C.A.4th 635.) Although plaintiffs also sought injunctive relief under C.C. 1785.31(b), that section requires the plaintiff to have been "aggrieved"; hence, the lack of damages also precluded injunctive relief. (157 C.A.4th 638.)



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e. Cosigner's Rights.

4 Witkin Sum. Cal. Law Sales § 304

[§ 304] Cosigner's Rights.

(1) *Notice of Delinquency.* C.C. 1799.101 provides that a creditor must not furnish adverse information with respect to any cosigner to a consumer credit reporting agency regarding a delinquency on a consumer credit contract entered into on or after July 1, 1992, unless *at or before the time the information is provided to the agency*, written notice of the delinquency is provided to the cosigner. (C.C. 1799.101(b); for definitions of "adverse information," "cosigner," and "delinquency," see C.C. 1799.101(a).) Neither may a creditor provide information regarding the cosigner's obligation on a consumer credit contract to a *debt collector*, until notice has been provided to the cosigner. (C.C. 1799.101(c).)

The notice requirements are satisfied by mailing a copy of the notice to the cosigner's address (C.C. 1799.101(e)), and they do not apply to a cosigner whose address is the same as that of the primary obligor (C.C. 1799.101(d)).

(2) *Notation of Cure.* Within a reasonable time after a creditor has reported to a credit reporting agency that a delinquency that had been reported to the agency and included in the cosigner's file has been cured, the agency must indicate in the file that the payment was made. (C.C. 1799.101(g).)

(3) *Recovery of Damages.* A cosigner who suffers a loss as a result of a violation of C.C. 1799.101 may recover the greater of actual damages or \$ 250, in addition to reasonable attorneys' fees. (C.C. 1799.102(a).) At least 30 days prior to bringing an action under C.C. 1799.102(a), the cosigner must notify the alleged violator of the cosigner's intention, including a statement of the specific evidence proving the cosigner's loss. If the alleged violator tenders to the cosigner an amount equal to the loss, or otherwise resolves the matter to the cosigner's satisfaction, within 25 days after receiving the notice, the cosigner is barred from further recovery, including reasonable attorneys' fees. (C.C. 1799.102(b).)

(4) *Waiver Prohibited.* The protections afforded by C.C. 1799.101, 1799.102 may not be waived. (C.C. 1799.104.)

SUPPLEMENT: [This section is current through the latest supplement]



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X. SPECIAL STATUTES REGULATING SALES
E. Consumer Protection Laws.
4. Commercial Credit Reports.

4 Witkin Sum. Cal. Law Sales § 305

[§ 305] Commercial Credit Reports.

(1) *Consumer Credit Reporting Agencies Act Distinguished.* C.C. 1785.41 et seq. govern commercial credit reporting. "The circumstances, business practices, and reports themselves differ sufficiently to make it impractical to include commercial credit reports under the Consumer Credit Reporting Agencies Act." (C.C. 1785.41; on Consumer Credit Reporting Agencies Act, see *supra*, §297 et seq.)

(2) *Definitions.* "Commercial credit report" is any report provided to a commercial enterprise for a legitimate business purpose, relating to the financial status or payment habits of a commercial enterprise that is the subject of the report. Excluded are reports subject to the Consumer Credit Reporting Agencies Act or the Investigative Consumer Reporting Agencies Act (*infra*, §306), or reports prepared for commercial insurance underwriting, claims, or auditing purposes. A "commercial credit report" does not include (a) any report containing information related to transactions or experiences between the subject and the person making the report; (b) any authorization or approval of a specific extension of credit directly or indirectly by a credit card issuer; or (c) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to the subject conveys its decision. (C.C. 1785.42(a).) A "commercial credit reporting agency" means any person who, for monetary fees, dues, or on a cooperative nonprofit basis, provides commercial credit reports to third parties. (C.C. 1785.42(b).)

(3) *Protection of Sources.* Commercial credit reporting agencies may protect the identity of providers of information used in their reports. (C.C. 1785.43(a).)

(4) *Right to Copy of Report.* Upon the request of a subject of a commercial credit report, a commercial credit reporting agency must provide a printed copy of the subject's report at a cost no greater than that usually charged to third parties. (C.C. 1785.43(b).)

(5) *Correction of Inaccuracies.* If the subject of a commercial credit report believes that the report contains an inaccurate statement of fact, the subject may, within 30 days after receiving the report, file with the commercial credit reporting agency a written statement of 50 words or less identifying the disputed statement of fact, and indicating the nature of the disagreement. Within 30 days after receiving the statement of disagreement, the commercial credit reporting agency must either delete the disputed item, or include in the report an indication that the subject's statement of disagreement will be provided upon request. (C.C. 1785.43(c).)

(6) *Waiver Prohibited.* The protections afforded by C.C. 1785.41 et seq. may not be waived. (C.C. 1785.44.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Consumer Credit Reporting Agencies Act Distinguished.* See *McClain v. Octagon Plaza, LLC* (2008) 159 C.A.4th 784, 800, 71 C.R.3d 885 [trial judge did not err in ruling that landlord did not violate Consumer Credit Reporting Agencies Act in obtaining report on commercial tenant; report was obtained for purposes described in C.C. 1785.42 and thus was exempt from Act under C.C. 1785.41].



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5. Investigative Consumer Reporting Agencies Act.

4 Witkin Sum. Cal. Law Sales § 306

[§ 306] Investigative Consumer Reporting Agencies Act.

The Investigative Consumer Reporting Agencies Act (C.C. 1786 et seq.) was enacted in 1975, the same year as the Consumer Credit Reporting Agencies Act (*supra*, §297). (See 7 *Pacific L. J.* 350; 8 *Pacific L. J.* 257; 24 *U.C.L.A. L. Rev.* 115.) It imposes a regulatory scheme similar to that of the Consumer Credit Reporting Agencies Act, but in a different area. As originally enacted, it only regulated agencies that investigate consumers and evaluate information gathered for *employment and insurance purposes*. Amendments broadened the scope to apply to agencies "collecting, assembling, evaluating, compiling, reporting, transmitting, transferring, or communicating information on consumers for employment and insurance purposes, and for purposes relating to the hiring of dwelling units, subpoenas and court orders, licensure, and other lawful purposes." (C.C. 1786(a).) The object of the Act is to insure "fairness, impartiality, and a respect for the consumer's right to privacy." (C.C. 1786(b); see C.C. 1786.57 [protections may not be waived]; Cal. Civil Practice, 5 Business Litigation, §56:40 et seq.; Cal. Transactions Forms, 5 Business Transactions §32:138 et seq.) The distinctive features of the Act are as follows:

(1) *The Agency*. An "investigative consumer reporting agency" is a person who, for fees or dues, engages in the practice of "collecting, assembling, evaluating, compiling, reporting, transmitting, transferring, or communicating information concerning consumers for the purposes of furnishing investigative consumer reports to third parties, but does not include any governmental agency whose records are maintained primarily for traffic safety, law enforcement, or licensing purposes, or any licensed insurance agent, insurance broker, or solicitor, insurer, or life insurance agent." (C.C. 1786.2(d).)

(2) *Information Compilers Other Than Agencies*. C.C. 1786.53 provides that any person who, for employment purposes, collects, assembles, evaluates, compiles, reports, transmits, transfers, or communicates public record information on a consumer's character, general reputation, personal characteristics, or mode of living, and does not use the services of an agency, must provide that information to the consumer within 7 days after receipt of the information. (C.C. 1786.53(a), (b).) This requirement also applies to "any person who receives information" under C.C. 1786.53(a). (C.C. 1786.53(b)(1).) The consumer's right to receive this information may be waived on a job application form by checking a box included in the application form for that purpose. (C.C. 1786.53(b)(2).)

(3) *The Report*. An "investigative consumer report" is one in which information "on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through any means." (C.C. 1786.2(c).) Prior to 1998, a

narrower definition required the information to have been obtained "through personal interviews," and on this basis, the court in *Cisneros v. U.D. Registry* (1995) 39 C.A.4th 548, 569, 46 C.R.2d 233, determined that a corporation that provided information on residential renters to landlords was not subject to the Act, as it did not obtain its information through personal interviews.

The report may be furnished only in response to a court order, in compliance with a lawful subpoena, in accordance with the written instructions of the consumer, or to a person who intends to use the information for employment or insurance purposes, or regarding hiring of a dwelling, or in connection with a determination of the consumer's eligibility for a governmental license or a judicial support order. Where the report is to be used for purposes relating to employment, insurance, licensing, judicial support, or the hiring of a dwelling unit, it may not be prepared or furnished unless the person requesting the report supplies the certification required by C.C. 1786.16 (*infra*, this section). Further, if a report sought for these purposes contains medical information about the consumer, the consumer's consent is required. (C.C. 1786.12.)

The statute requires disclosure to the consumer that the report is sought for insurance purposes (C.C. 1786.16(a)(1)), employment purposes (C.C. 1786.16(a)(2)), or in connection with the hiring of a dwelling unit (C.C. 1786.16(a)(3)). The person seeking the report must certify to the agency that the required disclosures have been made and that the person will comply with C.C. 1786.16(b) (affording consumer opportunity to request copy of report). (C.C. 1786.16(a)(4), (a)(5).) And, except in specified circumstances, no report may contain information concerning (a) bankruptcies antedating the report by more than 10 years; (b) suits and satisfied judgments antedating the report by more than 7 years; (c) unsatisfied judgments antedating the report by more than 7 years; (d) unlawful detainer actions where the defendant was the prevailing party or where the action was settled; or (e) paid tax liens, accounts placed for collection, arrest records or convictions, or any other adverse information antedating the report by more than 7 years. Except under limited circumstances, the agency may not include adverse information received from persons acquainted with the consumer, and it must verify information relating to arrests, convictions, and judgments if the information is a matter of public record. (C.C. 1786.18.)

The agency must maintain reasonable procedures designed to avoid violations of C.C. 1786.18, *supra*, and to limit reports to the purposes listed in C.C. 1786.12, *supra*. (C.C. 1786.20.)

Additional provisions require updating of adverse public record information (C.C. 1786.28), reverification of other adverse information (C.C. 1786.30), and notice to the consumer of sources of information on which any adverse action is based (C.C. 1786.40).

(4) *Notices Provided by Agency.* On the first page of a report, the agency must include a notice stating that: (a) the report does not guarantee the accuracy or truthfulness of the information as to the subject of the investigation, but only that it is accurately copied from public records; and (b) information generated as a result of identity theft, including evidence of criminal activity, may be inaccurately associated with the consumer. (C.C. 1786.29(a).) Additionally, the agency must provide to a consumer seeking to obtain a copy of a report or making a request to review a file a written notice setting forth the consumer's rights to receive all disclosures as provided in C.C. 1786.26, *infra*. (C.C. 1786.29(b).)

(5) *Inspection of Files.* The consumer is entitled to inspect the agency's files maintained on him or her. (C.C. 1786.10.) When a report is supplied to a person other than the consumer, a copy of the report must be made available, on request and proper identification, to the consumer for at least 2 years after the date the report was supplied to the other person. (C.C. 1786.11.) (See C.C. 1786.22 [time and methods of disclosing files]; C.C. 1786.24 [disputed items, reinvestigation, and deletions from file]; C.C. 1786.26 [which disclosures or notifications must be made without charge, and which may be made for fee not exceeding \$ 8].)

(6) *Remedies.* An agency or user of information that fails to comply with any requirement of the statute is liable to the consumer for (a) actual damages sustained, or \$ 10,000, whichever sum is greater; and (b) costs and attorneys' fees. (C.C. 1786.50(a).) If the violation was "grossly negligent or willful," punitive damages may be recovered. (C.C.

1786.50(b).)

The statute does not preclude an action by the consumer for invasion of privacy or defamation. (C.C. 1786.52.) (Cf. C.C. 1785.32, of the Consumer Credit Reporting Agencies Act, supra, §297, which prohibits an action for defamation, invasion of privacy or negligence, "except as to false information furnished with malice or willful intent to injure such consumer.")

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SUPPLEMENT: [This section is current through the latest supplement]

(3) *The Report*.

(*New*) *Unconstitutionality as to tenant screening reports*: The Act is unconstitutionally vague as applied to tenant screening reports containing unlawful detainer information. Reasonable persons cannot readily determine whether unlawful detainer information is "character" information within the meaning of C.C. 1786.2(c) and thus subject to the Act, or whether it is "creditworthiness" information governed by the Consumer Credit Reporting Agencies Act (text, §297). (*Ortiz v. Lyon Management Group* (2007) 157 C.A.4th 604, 619, 69 C.R.3d 66 [summary judgment was proper in favor of defendant apartment management group in action alleging that defendant violated Act by obtaining plaintiff rental applicant's tenant screening report in order to assess her application]; see *Trujillo v. First Amer. Registry* (2007) 157 C.A.4th 628, 640, 68 C.R.3d 732 [because of unconstitutional vagueness of Act, summary adjudication in favor of defendant credit reporting agency was proper on causes of action alleging that defendant supplied tenant screening reports containing unlawful detainer information].)



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6. Disclosure of Reasons for Denying Consumer Credit.

4 Witkin Sum. Cal. Law Sales § 307

[§ 307] Disclosure of Reasons for Denying Consumer Credit.

The Holden Credit Denial Disclosure Act of 1976 (C.C. 1787.1 et seq.) provides that, upon denying a written application for consumer credit, the creditor must give the applicant (1) notice of the denial within 30 days (or later reasonable time as specified in federal law), and (2) a statement of either the specific reasons for the denial or the identity and address of the person or office from which the reasons may be ascertained. (C.C. 1787.2.) The protections afforded by the Act may not be waived. (C.C. 1787.4.)

Violation may make the creditor liable to the applicant for actual and punitive damages plus attorneys' fees. (C.C. 1787.3.) (See *8 Pacific L. J.* 262.)

SUPPLEMENT: [This section is current through the latest supplement]



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E. Consumer Protection Laws.
7. Consumer Contract Awareness Act.

4 Witkin Sum. Cal. Law Sales § 308

[§ 308] Consumer Contract Awareness Act.

C.C. 1799.200 et seq., the Consumer Contract Awareness Act of 1990, provides for delivery to a consumer of a copy of his or her consumer contract. A "consumer contract" is defined as "a writing prepared by a seller" and except as provided in C.C. 1799.202(c) (infra, this section), "signed, or to be signed, by a consumer, which provides (1) for the sale or lease of goods or services that are purchased or leased primarily for personal, family, or household purposes, or (2) for extension of credit, the proceeds of which are used primarily for personal, family, or household purposes." Excluded from the definition of consumer contract are applications for credit. (C.C. 1799.201(b).)

(1) *Delivery of Copy of Contract.* A seller must deliver a copy of the consumer contract to the consumer at the time the consumer signs the contract, if the contract is signed at the seller's place of business. If the contract is not signed at the seller's place of business, and the seller has not provided a copy of the contract for the consumer to keep, the seller must mail or deliver a copy of the contract to the consumer within 10 calendar days after the seller receives the signed contract. In any case, the copy of the contract provided to the consumer must not contain any blank spaces to be completed after the consumer signs the contract; must contain the seller's signature if the contract provides for it; and may also contain the consumer's signature. (C.C. 1799.202(a).)

A seller that is a financial institution need not deliver to the consumer any writing that the consumer contract incorporates by reference, if the writing was previously delivered or mailed to the consumer, or if the writing was not prepared by the seller. (C.C. 1799.202(b).)

If the consumer contract is (a) contained in whole or in part on a card or other writing used to identify the consumer in connection with a deposit account, safe deposit box, safekeeping agreement, or other service offered by a financial institution, and (b) contains information particular to the consumer's account, box, or other arrangement that could be used by a third party to cause loss to the consumer or financial institution, the copy furnished to the consumer need not contain the consumer's signature or any identifying information particular to the account, box, or other arrangement. (C.C. 1799.202(c).)

Within a reasonable time after receiving a consumer's written request, a seller or financial institution must mail a copy of the consumer's completed consumer credit application to the address indicated on the request. By making the request, the consumer waives any action against the seller or financial institution arising out of the mailing or delivery

of the copy. The seller or financial institution may charge the consumer a reasonable copying fee, and need not provide the copy until the fee is paid. (C.C. 1799.202(d).)

Compliance with C.C. 1799.202 is established if a copy of any consumer contract which is subject to C.C. 1810.1 et seq. (supra, §282 et seq.), or which is an open-end consumer credit plan subject to the federal Truth in Lending Act, is delivered or mailed to the consumer before the consumer enters into a transaction covered and permitted by the contract. (C.C. 1799.203(a).) If more than one consumer has signed a consumer contract, the seller may comply with C.C. 1799.202 by mailing or delivering a copy to *any one of the consumers* residing at the same address. Any other consumer who has signed the contract but who does not reside at the same address must also be mailed or delivered a copy. (C.C. 1799.204.)

(2) *Exceptions.* C.C. 1799.202 does not apply to: (a) a consumer contract for the purchase of goods by mail, if the seller permits a consumer to examine the goods for 7 calendar days and cancel the contract and receive a full refund within 30 calendar days for returned goods that are unused and undamaged; (b) a written contract created by, and consisting of, an exchange of letters by mail; or (c) any consumer contract that is required to be mailed or delivered at a time prescribed by law. (C.C. 1799.203(b).)

(3) *Penalties.* A seller failing to comply with C.C. 1799.202 is liable to the consumer for any actual damages suffered as a result of that failure. (C.C. 1799.205(a) [remedy is nonexclusive and in addition to other available remedies or penalties].)

(4) *Delivery of Copy of Guaranty.* A seller must deliver a copy of a consumer contract guaranty to the guarantor at the time the guaranty is signed by the guarantor if the guaranty is signed at the seller's place of business. If the guaranty is not signed at the seller's place of business, and the seller has not provided a copy of the guaranty for the guarantor which the guarantor is able to keep, the seller must mail or deliver a copy of the guaranty to the guarantor within 10 calendar days after the seller receives the signed guaranty. In any case, a copy of the guaranty provided to the guarantor must not contain any blank spaces to be completed after the guarantor signs the guaranty, and must contain the seller's signature if the guaranty provides for that signature. The copy may also contain the guarantor's signature. (C.C. 1799.206(a).) A "consumer contract guaranty" is defined as a writing prepared by a seller and signed, or to be signed, by a guarantor which guarantees a consumer's contractual obligation. (C.C. 1799.201(c).)

If more than one guarantor has signed a consumer contract guaranty, the seller may comply with C.C. 1799.206(a) by mailing or delivering a copy to *any one of the guarantors* residing at the same address. Any other guarantor who has signed the guaranty but who does not reside at the same address must also be mailed or delivered a copy. (C.C. 1799.206(b).)

A seller failing to comply with C.C. 1799.206 is liable to the guarantor for any actual damages suffered as a result of that failure. (C.C. 1799.206(c) [remedy is nonexclusive and in addition to other available remedies or penalties].)

(5) *Waiver Prohibited.* The protections afforded by the Act may not be waived. (C.C. 1799.207.)

SUPPLEMENT: [This section is current through the latest supplement]



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E. Consumer Protection Laws.

8. Credit Services Act.

a. Nature and Scope of Statute.

4 *Witkin Sum. Cal. Law Sales* § 309

[§ 309] Nature and Scope of Statute.

(1) *In General.* The Legislature, recognizing a need to protect consumers from the practices of certain organizations that offer assistance in obtaining credit or improving credit standing, enacted the Credit Services Act of 1984. (C.C. 1789.10 et seq.; see 16 *Pacific L. J.* 589; Cal. Civil Practice, 5 Business Litigation, §56:66 et seq.) Its object is "to provide prospective buyers of services of credit services organizations with the information necessary to make an intelligent decision regarding the purchase of those services and to protect the public from unfair or deceptive advertising and business practices." (C.C. 1789.11(b).)

(2) *Credit Services Organization.* A "credit services organization" means a person who, with respect to the extension of credit by others, and in return for money or other valuable consideration, offers services in connection with (a) improving a buyer's credit record, history, or rating; or (b) obtaining a loan or other extension of credit for a buyer. *Excluded* are lenders regulated by state or federal agencies; banks or savings and loan institutions eligible for federal insurance on deposits; nonprofit organizations exempt from taxation (but not private foundations); persons licensed as proraters by the Department of Corporations; licensed real estate brokers; attorneys (but not attorneys employed by or directly affiliated with a credit services organization); and broker-dealers registered with the Securities and Exchange Commission or the Commodity Futures Trading Commission. (C.C. 1789.12.)

(3) *Waiver of Act.* Any waiver of the Act's provisions is void and unenforceable, and an attempt by a credit services organization to have a buyer waive his or her rights is a violation of the Act. (C.C. 1789.19(a).)

(4) *Act Not Exclusive.* The provisions of the Act are not exclusive and do not relieve the parties from compliance with any other applicable provisions of law. (C.C. 1789.22.)

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SUPPLEMENT: [This section is current through the latest supplement]



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8. Credit Services Act.
b. Prohibited Acts.

4 Witkin Sum. Cal. Law Sales § 310

[§ 310] Prohibited Acts.

A credit services organization may not do any of the following acts:

- (1) Charge or receive payment prior to full performance of its services. (C.C. 1789.13(a).)
- (2) Fail to perform the agreed services within 6 months after the date the buyer signs the contract. (C.C. 1789.13(b).)
- (3) Charge or receive payment for referring a buyer to a seller or other credit grantor who will extend credit, if that credit will be extended to the buyer on substantially the same terms (a) available to the general public, or (b) that would have been extended to the buyer without the credit services organization's assistance. (C.C. 1789.13(c).)
- (4) Make or advise a buyer to make an untrue or misleading statement to a consumer credit reporting agency, or to a person who has extended credit to the buyer or to whom the buyer has applied for credit, with respect to the buyer's identification, credit standing, or credit capacity. (C.C. 1789.13(d).)
- (5) Remove, or assist or advise the buyer to remove, adverse information from the buyer's credit record, if that information is accurate and not obsolete. (C.C. 1789.13(e).)
- (6) Create, or assist or advise the buyer to create, a new credit record by using a different identity. (C.C. 1789.13(f).)
- (7) Make or use any untrue or misleading representations in the offer or sale of its services. (C.C. 1789.13(g).)
- (8) Engage in any fraudulent practice in connection with the offer or sale of its services. (C.C. 1789.13(h).)
- (9) Advertise its services without being registered with the Department of Justice. (C.C. 1789.13(i); see C.C. 1789.25 [registration of credit services organizations with Department of Justice].)
- (10) Fail to maintain an agent for service of process. (C.C. 1789.13(j).)

(11) Transfer or assign its certificate of registration. (C.C. 1789.13(k).)

(12) Submit a buyer's dispute to a consumer credit reporting agency without the buyer's knowledge. (C.C. 1789.13(l).)

(13) Use a consumer credit reporting agency's telephone system or toll-free number to represent the caller as the buyer, in submitting a dispute of a buyer or requesting disclosure without the buyer's prior authorization. (C.C. 1789.13(m).) (See 24 *Pacific L. J.* 708.)

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SUPPLEMENT: [This section is current through the latest supplement]

(3) *Charge or receive payment for referral:* C.C. 1789.13(c) was amended in 2007 to provide that the charge or receipt of payment may also not be made if the money or consideration "is paid by the credit grantor or is derived from the buyer's payments to the credit grantor for any costs, fees, finance charges, or principal." (*New*) *Additional prohibited acts:* C.C. 1789.13 was amended in 2007 to add the following prohibited acts:

(14) Extend credit to any buyer. (C.C. 1789.13(n).)

(15) Refer any buyer to a credit grantor that is related to the credit services organization by common ownership, management, or control, including any common owner, director, or officer. (C.C. 1789.13(o).)

(16) Refer any buyer to a credit grantor for which the credit services organization provides, or arranges to have provided, any services related to the extension of credit "such as underwriting, billing, payment processing, or debt collection." (C.C. 1789.13(p).)

(17) Provide a credit grantor with any assurance that any portion of a credit extension to a buyer referred by the credit services organization will be repaid, "including providing a guaranty, letter of credit, or agreement to acquire any part of the credit grantor's financial interest in the extension of credit." (C.C. 1789.13(q).)

(18) Use any scheme, device, or contrivance to evade the prohibitions of C.C. 1789.13. (C.C. 1789.13(r).)



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8. Credit Services Act.

c. Information Statements.

4 *Witkin Sum. Cal. Law Sales* § 311

[§ 311] Information Statements.

A credit services organization must give the buyer a *written information statement* prior to execution of a contract between the organization and the buyer. (C.C. 1789.14.) The statement must set forth the following:

- (1) A description of the services to be performed by the credit services organization and the total cost of the services. (C.C. 1789.15(a).)
- (2) The buyer's right to proceed against the credit services organization's surety bond required by C.C. 1789.18 (C.C. 1789.15(b)), and the name and address of the surety company that issued the bond (C.C. 1789.15(c)).
- (3) A complete and accurate statement of the availability of nonprofit credit counseling services. (C.C. 1789.15(d).)

C.C. 1789.15 further provides that the information statement must be printed in at least 10-point boldface type, and must include a specified statement, or a substantially equivalent alternative approved by the Department of Justice, outlining the buyer's consumer credit file rights under California and federal law.

SUPPLEMENT: [This section is current through the latest supplement]



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8. Credit Services Act.
d. Requisites of Contract.

4 Witkin Sum. Cal. Law Sales § 312

[§ 312] Requisites of Contract.

(1) *In General.* A credit services organization may not provide any service to a buyer except pursuant to a written contract complying with C.C. 1789.16.

C.C. 1789.16(a) requires that every contract between a buyer and a credit services organization be written, dated, signed by the buyer, and include the following: (1) a statement (in at least 10-point bold type) in immediate proximity to the space reserved for the buyer's signature, as follows: "You, the buyer, may cancel this contract at any time prior to midnight of the fifth day after the date of the transaction. See the attached notice of cancellation form for an explanation of this right."; (2) the terms and conditions of payment; (3) a detailed description of the services to be performed; and (4) the organization's principal business address and the name and address of its agent, other than the Secretary of State, authorized to receive service of process.

C.C. 1789.16(b) requires that the contract be accompanied by a completed form in duplicate, captioned "Notice of Cancellation," which must be attached to the contract and contain (in at least 10-point type) the following statement written in the same language as used in the contract:

"Notice of Cancellation"

"You may cancel this contract, without any penalty or obligation, within five days from the date the contract is signed.

"If you cancel, any payment made by you under this contract must be returned within 15 days following receipt by the seller of your cancellation notice.

"To cancel this contract, mail or deliver a signed and dated copy of this cancellation notice, or any other written notice, to

In addition, a copy of the completed contract and all other documents requiring the buyer's signature must be given to the buyer at the time they are signed. (C.C. 1789.16(b).)

(2) *Modifications.* The written contract requirement of C.C. 1789.16(a) applies not just to the initial contract, but also to contract modifications. A contrary interpretation of the statutory language would permit an unscrupulous provider of credit services to overcome the protections of the Credit Services Act by obtaining the buyer's signed assent to a set of terms and then notifying the buyer that a different set of terms applies. (*Mitchell v. American Fair Credit Assn.* (2002) 99 C.A.4th 1345, 1354, 122 C.R.2d 193 [credit services organization could not bind current members of credit club to arbitration clause simply by notifying them that arbitration of disputes was condition of continued membership].)

SUPPLEMENT: [This section is current through the latest supplement]



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8. Credit Services Act.

e. Remedies and Penalties.

4 Witkin Sum. Cal. Law Sales § 313

[§ 313] Remedies and Penalties.

A buyer injured by a violation of the Act or by a credit service organization's breach of contract may bring an action for damages, for injunctive relief, or both. The buyer is entitled to recover actual damages, but in no case less than the amount paid to the organization, plus attorneys' fees and costs. Punitive damages may also be awarded. (C.C. 1789.21(a).)

Any person, including (1) a consumer credit reporting agency or (2) a user, or a furnisher, of a consumer credit report under the Consumer Credit Reporting Agencies Act (*supra*, §297 et seq.), may seek damages or injunctive relief for a violation of the Credit Services Act. (C.C. 1789.21(b).)

The Act's remedies are in addition to any other remedies provided by law. (C.C. 1789.22.) And a violation other than a seller's breach of a contract subject to the Act (C.C. 1789.17) is a misdemeanor. (C.C. 1789.20.)

West's Key Number Digest, Consumer Protection k.30 et seq.

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9. Consumer Warranties.
a. Scope of Act.

4 Witkin Sum. Cal. Law Sales § 314

[§ 314] Scope of Act.

(1) *In General.* The Song-Beverly Consumer Warranty Act (C.C. 1790 et seq.), enacted in 1970 and amended many times, defines a broad class of consumer sales (see supra, §52), and specifies the requirements for the creation and exclusion of warranties accompanying such sales (see supra, §§56, 69 et seq., 90). (See 14 Santa Clara Lawyer 575; 9 U.S.F. L. Rev. 552; Cal. Transactions Forms, 5 Business Transactions §33:21 et seq.; CACI, No. 3200 et seq. [violations of Song-Beverly Consumer Warranty Act].) However, the Act does not apply to any defect or nonconformity caused by unauthorized or unreasonable use of consumer goods after sale. (C.C. 1794.3.)

(2) *Retailer's Warranty.* C.C. 1792 adds to the manufacturer's warranty of merchantability a similar retail seller's warranty, and gives the retail seller a right of indemnity against the manufacturer.

(3) *Leases.* C.C. 1795.4 extends the Act to cover *leases of both new and used consumer goods*, and provides that where express warranties are regularly furnished to purchasers, those warranties will be deemed to apply to leased goods "of substantially the same kind." For purposes of any warranty provision limiting warranty benefits to the original purchaser, the lessor and lessee "shall each be deemed to be the first purchaser."

(4) *Vehicle Service Contracts.* A vehicle service contract that is sold for an additional cost and that does not use the words "warrant" or "guarantee" is not an express warranty for purposes of the Act. (*Gavaldon v. DaimlerChrysler Corp.* (2004) 32 C.4th 1246, 1261, 13 C.R.3d 793, 90 P.3d 752, *infra*, §326.)

(5) *Waiver of Act.* Any waiver of the provisions of the Act, except as expressly authorized, is void. (C.C. 1790.1.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See C.E.B., Law of Contracts §6.24.(4a) (*New Armed Forces Members*). The Song-Beverly Consumer Warranty Act applies to the purchase of a motor vehicle by a member of the Armed Forces "regardless of in which state his or her motor vehicle is purchased or registered," provided: (a) The member purchases the motor vehicle with a manufacturer's express warranty from a manufacturer who sells motor vehicles in California or from an agent or representative of the manufacturer; and (b) the member was stationed in or a resident of California at the time he or she purchased the motor vehicle, or at the time he or she filed an action under the Act. (C.C. 1795.8, added in 2007; for

definition of "member of the Armed Forces," see C.C. 1791(t), added in 2007.)



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4 Witkin Sum. Cal. Law Sales § 315

[§ 315] Language of Warranty.

Express warranties must be stated in simple and readily understandable language, and must conform to the standards set forth in the Magnuson-Moss Warranty Act (15 U.S.C., §2301 et seq.) and the implementing Federal Trade Commission regulations (16 C.F.R., §701.1 et seq.). (C.C. 1793.1(a)(1); see 26 U.C.L.A. L. Rev. 583 [Consumer Warranty Law Under Commercial Code, Song-Beverly and Magnuson-Moss Warranty Acts]; *infra*, §327.)

Formal words such as "warrant" or "guarantee" need not be used, "but if such words are used then an express warranty is created." (C.C. 1791.2(b).)

Where a warranty or product registration card or form is provided, to be completed and returned by the consumer, it must clearly inform the consumer that the card or form is for product registration and failure to complete and return it does not diminish any warranty rights. (C.C. 1793.1(a)(1).)

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- c. Regulatory Provisions.
- 1. Notice of Rights Under Warranty.

4 Witkin Sum. Cal. Law Sales § 316

[§ 316] Notice of Rights Under Warranty.

Every work order or repair invoice for warranty repair or service must include, in 10-point boldface type, a statement, in the specified form, of the buyer's rights under the warranty, including the grounds justifying extension of the warranty. The statement may be on the face of the order or invoice, the reverse side, or on an attachment. If the statement is on the reverse side, notice of that fact, in the specified form, must be printed on the face of the document. (C.C. 1793.1(a)(2).)

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 - 2. Maintenance of Service and Repair Facilities.

4 Witkin Sum. Cal. Law Sales § 317

[§ 317] Maintenance of Service and Repair Facilities.

(1) *In General.* Manufacturers making express warranties concerning consumer goods sold in the state must maintain service and repair facilities reasonably close to all areas where the goods are sold. (C.C. 1793.2(a)(1)(A); see *California State Electronics Assn. v. Zeos Int. Ltd.* (1996) 41 C.A.4th 1270, 1276, 1277, 49 C.R.2d 127 [C.C. 1793.2(a)(1)(A) was inapplicable to out-of-state computer manufacturer; because sales were by telephone and, under U.C.C. 2401(2)(a) (supra, §128), title passed at time of shipment, goods were not sold "in this state"].) Manufacturers may meet this obligation by entering into "warranty service contracts with independent service and repair facilities." (C.C. 1793.2(a)(1)(B); for definition of "independent repair or service facility," see C.C. 1791(f).) These contracts may not be for more than 1 year, and are renewable only by a separate, new contract or letter of agreement between the manufacturer and independent facility. (C.C. 1793.2(a)(1)(B).)

Distributors or retail sellers giving express warranties in a sale of used consumer goods must also maintain sufficient service and repair facilities in the state. (C.C. 1795.5(a).) (On duty of those installing, repairing, or servicing new or used consumer goods to do their work in "a good and workmanlike manner," see C.C. 1796, 1796.5.)

(2) *Service Literature and Replacement Parts.* The manufacturer must also make available to authorized service and repair facilities sufficient service literature and replacement parts to effect repairs during the warranty period. (C.C. 1793.2(a)(3).)

(3) *Failure To Provide Facilities, Literature, or Parts.* If the manufacturer fails to provide the required facilities, or fails to make available the required literature and replacement parts, the buyer may return nonconforming goods to the retail seller or a retail seller of like goods, or take the goods to an independent facility for service or repair at the manufacturer's expense. (C.C. 1793.3; see C.C. 1793.5 [manufacturer's liability to retailer]; 8 *Pacific L. J.* 267.)

(4) *Information as to Location of Facilities.* A manufacturer, distributor, or retailer making express warranties and maintaining service and repair facilities in the state must (a) provide the buyer with the name and address of the service and repair facilities, or the name, address, and telephone number of a service and repair facility central directory (C.C. 1793.1(e)(1), (e)(2)); or (b) maintain at the premises of retail sellers a current listing of the warrantor's authorized

service and repair facilities, or retail sellers to whom goods can be returned for service and repair (C.C. 1793.1(e)(3)).

(5) *Where Service or Repair Not Practicable.* Because of the method of installation or because the goods have become affixed to real property, repair or servicing may not be practicable. In such cases and subject to specified exceptions, the manufacturer must either replace and install the goods, or "reimburse the buyer in an amount equal to the purchase price paid by the buyer, including installation costs, less that amount directly attributable to use by the buyer prior to the discovery of the nonconformity." (C.C. 1793.2(e).)

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aa. In General.

4 *Witkin Sum. Cal. Law Sales* § 318

[§ 318] In General.

If a manufacturer or its representative is unable to repair *defective goods* after a reasonable number of attempts, it must provide a replacement or a prorated refund. (C.C. 1793.2(d)(1).) If a manufacturer or its representative is unable to repair a *new motor vehicle* after a reasonable number of attempts, the manufacturer must offer a replacement or restitution. The buyer may elect restitution in lieu of replacement, and cannot be required to accept a replacement vehicle. (C.C. 1793.2(d)(2).) (See *Krotin v. Porsche Cars North America* (1995) 38 C.A.4th 294, 300, 303, 45 C.R.2d 10 [in warranty action by lessee of new vehicle, instruction that plaintiff was required to reject or revoke acceptance of vehicle in reasonable time was erroneous; manufacturer's duty of replacement or restitution arises after reasonable number of unsuccessful repair attempts, and lessee need not reject or revoke acceptance at any time]; *Silvio v. Ford Motor Co.* (2003) 109 C.A.4th 1205, 1208, 1209, 135 C.R.2d 846 [where manufacturer and dealer were given only one opportunity to repair defect (sudden, unexpected acceleration), obligations of C.C. 1793.2(d) were not triggered; "even where the defect is life-threatening, one opportunity to repair is not enough"]; *Mocek v. Alfa Leisure* (2003) 114 C.A.4th 402, 407, 7 C.R.3d 546 [seller was not entitled to opportunity to repair defects in trailer's electrical system before refunding purchase price, where defects constituted breach of implied warranty of merchantability; repair-or-replace scheme of C.C. 1793.2(d) is not triggered by breach of implied warranty]; *Jiagbogu v. Mercedes-Benz USA* (2004) 118 C.A.4th 1235, 1241, 1244, 13 C.R.3d 679 [car buyer's request for replacement or refund did not constitute rescission, and thus, in action under Act, trial judge did not err in refusing to instruct jury on waiver of right to rescind or on statutory offsets for post-rescission use; offset under equitable principles was also unjustified, as it would create disincentive to provide prompt replacement or refund]; CACI, Nos. 3201, 3241; on presumption as to reasonable number of attempts, see *infra*, §319; on damages for violation of C.C. 1793.2(d)(2), see *infra*, §323.)

The 1987 amendment that subdivided C.C. 1793.2(d), creating separate remedies for defective goods and new motor vehicles, had the effect of expanding the protections to buyers of new motor vehicles, but it left in place the repair-or-replace requirements as to all other consumer goods. (*National R.V. v. Foreman* (1995) 34 C.A.4th 1072, 1079, 40 C.R.2d 672 [Song-Beverly remedies were available to purchasers of motor home in breach of warranty action against manufacturer of coach portion of home; although, under C.C. 1793.22(e)(2) (*infra*, §319), only chassis of motor

home is included in definition of new motor vehicle, coach portion comes within general consumer goods protections of C.C. 1793.2(d)(1).)

In *Ibrahim v. Ford Motor Co.* (1989) 214 C.A.3d 878, 263 C.R. 64, plaintiff automobile buyer sought from defendant manufacturer a refund of the purchase price and other relief under C.C. 1793.2. Plaintiff had returned the automobile a number of times to the seller, one of the manufacturer's dealerships, in an unsuccessful attempt to correct the tendency of the automobile's engine to surge or die unexpectedly. The trial judge instructed the jury that (1) the "replace or refund" provisions of C.C. 1793.2 were not activated until defendant manufacturer, not the dealership, had at least one opportunity to repair plaintiff's automobile; and (2) plaintiff had the burden of proving that defendant's failure to repair the defect after a reasonable number of attempts was not caused by conditions beyond defendant's control. The jury returned a verdict for defendant. *Held*, reversed.

(a) The 1981 Legislature expressly rejected a proposed amendment to C.C. 1793.2 that would have required that the manufacturer be permitted at least one attempt to repair the automobile. The Legislature instead chose to treat the manufacturer and its representative dealer as a single entity, the repair efforts of both being aggregated for the purpose of calculating whether there had been "a reasonable number of attempts" to conform the automobile to the warranty. (214 C.A.3d 889.)

(b) The instruction that plaintiff had the burden of proving that defendant's failure to repair the defect was not caused by conditions beyond defendant's control improperly assigned to plaintiff the burden concerning an issue that defendant was required to prove. Further, it reemphasized the erroneous impression that defendant could not be found liable unless and until it had been given at least one chance to fix the problem. (214 C.A.3d 892.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Robertson v. Fleetwood Travel Trailers of Calif.* (2006) 144 C.A.4th 785, 799, 50 C.R.3d 731 [in action by buyers of travel trailer against manufacturer, evidence supported jury's finding that manufacturer was given reasonable number of attempts to repair defective shower prior to buyers' repurchase demand; authorized representative made several visits during which it repaired shower, but when buyers uncovered extensive damage caused by leaks before shower was fixed, they refused to allow further repair attempts and demanded repurchase]; *Dominguez v. American Suzuki Motor Corp.* (2008) 160 C.A.4th 53, 59, 72 C.R.3d 354 [motorcycle manufacturer did not violate C.C. 1793.2(d)(1) where it offered to repurchase plaintiff's motorcycle approximately 6 weeks after plaintiff's repurchase demand; earlier letter from manufacturer asking plaintiff to take motorcycle, which had been submitted for repair on at least five occasions, to authorized dealer for inspection and repair did not constitute wilful refusal to comply]; *Fry v. Pro-Line Boats* (2008) 163 C.A.4th 970, 972, 77 C.R.3d 622 [substantial evidence supported jury's findings that boat manufacturer, after reasonable number of opportunities, successfully repaired boat to conform to express warranties]; CACI, No. 3202 ["Repair Opportunities" Explained]; on breach of duty to purchase or replace *consumer goods*, see CACI, No. 3200.(New) *Presentation Requirement:* In order to take advantage of the repair or replace remedy of C.C. 1793.2(d), the buyer must satisfy the "presentation" requirement of C.C. 1793.2(c), i.e., the buyer must show that the product was presented to an authorized representative of the manufacturer for repair. However, there is no evidence that the Legislature intended to rule out satisfaction of this requirement by reasonable methods other than direct delivery to the representative. Under some circumstances, a "house call" by the representative may be a reasonable method. (*Robertson v. Fleetwood Travel Trailers of Calif.*, *supra*, 144 C.A.4th 806.)

(New) *New Motor Vehicles Purchased Out of State:* C.C. 1793.2(d)(2), with its repair-or-replace remedy, does not apply to new motor vehicles purchased outside California. Under C.C. 1793.2(a), which was part of the Act as originally enacted, a manufacturer of consumer goods sold in California must make available to buyers service and repair facilities at which goods can be repaired to conform to any express warranties provided by the manufacturer. (See text, §317.) When C.C. 1793.2(d)(2) was later added, it was made applicable only to new motor vehicles, and there is no indication that the Legislature intended to expand its coverage beyond that of other portions of the Act, to goods sold outside California. (*Cummins v. Superior Court* (2005) 36 C.4th 478, 484, 491, 30 C.R.3d 823, 115 P.3d 98 [California residents who purchased motor home in another state were not entitled to replacement vehicle or refund under C.C.

1793.2(d)(2) after in-state repair facility was unable to remedy defects]; see *Davis v. Newmar Corp.* (2006) 136 C.A.4th 275, 278, 38 C.R.3d 690 [in action under Act against manufacturer and seller of motor home, trial judge erred in denying defendants' pretrial motion to dismiss; although sale to plaintiff was negotiated under contract governed by California law, title passed upon delivery to plaintiff in Nevada].)



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bb. Tanner Consumer Protection Act.

4 *Witkin Sum. Cal. Law Sales* § 319

[§ 319] Tanner Consumer Protection Act.

The Tanner Consumer Protection Act (C.C. 1793.22), enacted in 1992, is a "lemon law" that adds to the Song-Beverly Consumer Warranty Act (*supra*, §314) protections specifically applicable to new motor vehicles. Under the Tanner Act, a "new motor vehicle" is a new motor vehicle that is "bought or used primarily for personal, family, or household purposes." It is also "a new motor vehicle with a gross vehicle weight under 10,000 pounds that is bought or used primarily for business purposes by a person, including a partnership, limited liability company, corporation, association, or any other legal entity, to which not more than five motor vehicles are registered in this state." The definition includes "the chassis, chassis cab, and that portion of a motor home devoted to its propulsion, but does not include any portion designed, used, or maintained primarily for human habitation, a dealer-owned vehicle and a 'demonstrator' or other motor vehicle sold with a manufacturer's new car warranty." (C.C. 1793.22(e)(2); see *Jensen v. BMW of North America* (1995) 35 C.A.4th 112, 123, 127, 41 C.R.2d 295 [car leased to plaintiff with balance remaining on manufacturer's new motor vehicle warranty was "new motor vehicle"; fact that manufacturer did not itself represent to plaintiff that she was covered by warranty did not make new motor vehicle warranty remedies unavailable, as those remedies have no privity requirement].) (See Cal. Transactions Forms, 5 Business Transactions §33:41 et seq.; on state motor vehicle "lemon laws," see 88 A.L.R.5th 301; 11 Proof of Facts 3d 343; 39 Am.Jur. Trials 1.)

The main protections are:

(1) *Criteria for Determining Reasonable Number of Attempts.* The replace or refund remedies of C.C. 1793.2 become available if the manufacturer or its representative is unable to repair the "nonconformity" (see C.C. 1793.22(e)(1), *infra*, this section) after a reasonable number of attempts. (See *supra*, §318.) The Act presumes that a reasonable number of repair attempts have been made if, within 18 months from delivery to the buyer or 18,000 miles on the odometer, whichever occurs first, (a) the nonconformity is likely to cause death or serious bodily injury, it has been subject to repair 2 or more times by the manufacturer or its agents, and the buyer or lessee has at least once directly notified the manufacturer of the need for the repair; (b) the nonconformity has been subject to repair 4 or more times by the manufacturer or its agents, and the buyer has at least once directly notified the manufacturer of the need for the repair; or (c) the vehicle is "out of service by reason of repair of nonconformities by the manufacturer or its agents

for a cumulative total of more than 30 calendar days since delivery of the vehicle to the buyer." This presumption affects the burden of proof and may be asserted by the buyer in any civil action or formal or informal proceeding. (C.C. 1793.22(b).) (See *Oregel v. American Isuzu Motors* (2001) 90 C.A.4th 1094, 1103, 1104, 109 C.R.2d 583 [six occasions on which plaintiff car owner presented vehicle to dealer to attempt to find source of oil leak counted as repair attempts, even if only on one occasion was part actually replaced]; *Jiagbogu v. Mercedes-Benz USA* (2004) 118 C.A.4th 1235, 1245, 13 C.R.3d 679 [where, in action under Act, buyer did not invoke presumption, trial judge properly refused to give instruction on it, despite argument that it would have given jury objective standard to decide if manufacturer had reasonable number of repair opportunities]; CACI, No. 3203.)

(2) *Definition of Nonconformity.* A nonconformity is one that "substantially impairs the use, value, or safety of the new motor vehicle to the buyer or lessee." (C.C. 1793.22(e)(1).) It is similar to what the average person would understand to be a defect. (*Schreidel v. American Honda Motor Co.* (1995) 34 C.A.4th 1242, 1249, 40 C.R.2d 576 [car's intermittent difficulty in shifting into first gear, which became worse as car aged and caused owner to experience panic and to avoid using car for long trips, constituted nonconformity substantially impairing use, value, and safety of car]; see *Lundy v. Ford Motor Co.* (2001) 87 C.A.4th 472, 478, 104 C.R.2d 545 [jury instruction that "substantially" meant nonconformity was not imaginary and actually impaired use, value, or safety of vehicle was improper as it effectively wrote term out of statute; substantiality requirement "injects an element of degree; not every impairment is sufficient to satisfy the statute"].)

(3) *Dispute Resolution.* If a qualified third-party dispute resolution process (as defined in C.C. 1793.22(d)) exists, and the buyer is timely notified in writing regarding its availability, the presumption created by C.C. 1793.22(b), *supra*, may not be asserted until after the buyer has resorted to the dispute resolution process. However, if such a process does not exist, or if the buyer is dissatisfied with the third-party decision, or if the manufacturer or its agent fails to promptly fulfill the terms of the decision after the decision has been accepted by the buyer, the buyer may assert the presumption in an action to enforce his or her rights under C.C. 1793.2(d). The findings and decision resulting from the process "shall be admissible in evidence in the action without further foundation." Further, any applicable limitations period is extended for a period equal to the number of days between the date the complaint is filed in the dispute resolution process and the date of the decision "or the date before which the manufacturer or its agent is required by the decision to fulfill its terms if the decision is accepted by the buyer, whichever occurs later." (C.C. 1793.22(c); on certification of third-party dispute resolution process, see *B. & P.C.* 472 *et seq.*)

(4) *Resale of Returned Vehicle.* A vehicle that has been "transferred" by a buyer or lessee to a manufacturer under C.C. 1793.2(d)(2) (*supra*, §318) may not be sold, leased, or transferred "unless the nature of the nonconformity experienced by the original buyer or lessee is clearly and conspicuously disclosed to the prospective buyer, lessee, or transferee, the nonconformity is corrected, and the manufacturer warrants to the new buyer, lessee, or transferee in writing for a period of one year that the motor vehicle is free of that nonconformity." (C.C. 1793.22(f); see also C.C. 1793.26 [one who reacquires vehicle may not prevent original buyer or lessee from disclosing problems with vehicle]; on further notification and retitling requirements, see *Automotive Consumer Notification Act*, *infra*, §320.)

SUPPLEMENT: [This section is current through the latest supplement]

Applicability of protections to business users: In *Park City Services v. Ford Motor Co.* (2006) 144 C.A.4th 295, 50 C.R.3d 373, a Texas valet parking business leased a limousine that came within the manufacturer's 3-year warranty. The limousine required numerous repairs, which proved unsuccessful, and the vehicle eventually burst into flames. The lessee brought an action against the manufacturer under the Song-Beverly Consumer Warranty Act. The trial judge ruled that the limousine was a "new vehicle" that came within the scope of the Act, and the jury found in favor of the lessee. *Held*, reversed; the Act did not apply. Although the Act protects some corporate purchasers of new motor vehicles for business use--namely, those to whom "not more than five motor vehicles are registered in this state" (C.C. 1793.22(e)(2))--it does not apply where, as here, the vehicle is used primarily for business purposes, it is not registered in California, and no other vehicles are registered to the plaintiff in *California*. (144 C.A.4th 298, 306.) Further, because the lessee's complaint, which alleged that the Act applied, was unverified, the manufacturer's general denial was

sufficient to place the Act's applicability at issue; it did not have to raise the issue by any kind of pretrial motion. (144 C.A.4th 309.) (2) *Definition of Nonconformity*. See CACI, No. 3204 ["Substantially Impaired" Explained].



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cc. Automotive Consumer Notification Act.

4 Witkin Sum. Cal. Law Sales § 320

[§ 320] Automotive Consumer Notification Act.

The Automotive Consumer Notification Act (C.C. 1793.23, 1793.24) addresses the problem of "used and irreparable motor vehicles" being reacquired by manufacturers or dealers and then resold without notice to subsequent purchasers as to the vehicles' repair history. (C.C. 1793.23(a).) The Act imposes disclosure and other requirements in the following situations:

(1) *Manufacturer's reacquisition of registered vehicle.* A manufacturer who reacquires or assists a dealer or lienholder to reacquire a motor vehicle registered in California, another state, or a federally administered district must, before selling, leasing, or transferring the vehicle in California (or before exporting it to another state for sale, lease, or transfer if the vehicle was registered in California and reacquired pursuant to C.C. 1793.2(d), *supra*, §318):

(a) Cause the vehicle to be retitled in the manufacturer's name.

(b) Request that the Department of Motor Vehicles inscribe the ownership certificate with the notation "Lemon Law Buyback."

(c) Affix a decal to the vehicle in accordance with *Veh.C. 11713.12*.

These requirements apply where the manufacturer knew or should have known that the vehicle was required by law to be replaced, accepted for restitution because of the failure of the manufacturer to conform the vehicle to applicable warranties under C.C. 1793.2(d), or accepted for restitution by the manufacturer because of the manufacturer's failure to conform the vehicle to warranties required by any other applicable state or federal law. (C.C. 1793.23(c).)

(2) *Manufacturer's reacquisition in response to buyer's request.* A manufacturer who reacquires or assists a dealer or lienholder to reacquire a vehicle in response to a request by the buyer or lessee that the vehicle be either replaced or accepted for restitution because the vehicle did not conform to express warranties must, before selling, leasing, or transferring it, execute and deliver to the transferee the notice set forth in *Veh.C. 1793.24* and obtain the transferee's

written acknowledgment of the notice. (C.C. 1793.23(d).)

(3) *Knowing acquisition of vehicle reacquired by manufacturer in response to owner's request.* Any person, including a dealer, who acquires a vehicle for resale and knows or should have known that the vehicle was reacquired by the vehicle's manufacturer in response to a request by the last retail owner or lessee of the vehicle that it be replaced or accepted for restitution because the vehicle did not conform to express warranties must, before selling, leasing, or transferring it, execute and deliver to the transferee the notice set forth in Veh.C. 1793.24 and obtain the transferee's written acknowledgment of the notice. (C.C. 1793.23(e).)

(4) *Transfer of vehicle with inscribed ownership certificate.* Any person, including a manufacturer or dealer, who sells, leases, or transfers ownership of a vehicle when the vehicle's ownership certificate is inscribed with the notation "Lemon Law Buyback" must, before the sale, lease, or transfer of ownership, provide the transferee with a specified disclosure statement, signed by the transferee. (C.C. 1793.23(f).)

The disclosure requirements of C.C. 1793.23(d), (e), (f) are cumulative with all other consumer notice requirements and do not relieve any person, including a dealer or manufacturer, of compliance with any other applicable law, including C.C. 1793.22(f) (*supra*, §319). (C.C. 1793.23(g).) (See 27 *Pacific L. J.* 508; Cal. Transactions Forms, 5 Business Transactions §33:43.)

SUPPLEMENT: [This section is current through the latest supplement]



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E. Consumer Protection Laws.

9. Consumer Warranties.

d. Penalties for Violations.

1. In General.

4 Witkin Sum. Cal. Law Sales § 321

[§ 321] In General.

(1) *Available Remedies.* An action for damages and other legal and equitable relief may be brought by a buyer injured by a violation of the Act. (C.C. 1794(a).) To establish a measure of damages, C.C. 1794(b) refers both to Uniform Commercial Code provisions and to the buyer's rights of replacement or reimbursement set forth in C.C. 1793.2(d) (*supra*, §318). C.C. 1794(c) permits a civil penalty not to exceed two times the amount of actual damages if the violation is wilful. (See CACI, No. 3244.) Additionally, C.C. 1794(e) establishes a penalty scheme applicable only in actions by new motor vehicle purchasers. (See *Jernigan v. Ford Motor Co. (1994) 24 C.A.4th 488, 492, 29 C.R.2d 348* [new motor vehicle purchaser may have recourse to civil penalties under C.C. 1794(c) where C.C. 1794(e) is inapplicable because dealer maintains qualified dispute resolution process]; *infra*, §323.)

(2) *Illustrations: Wilful Violations.* In *Kwan v. Mercedes-Benz of North America (1994) 23 C.A.4th 174, 28 C.R.2d 371*, plaintiff purchaser of a new automobile sued defendant dealer for violation of C.C. 1793.2(d)(2). The jury found defendant liable, awarded actual damages, and awarded a civil penalty under C.C. 1794(c) for wilful violation, after being instructed that "willful" means "simply a purpose or willingness to commit the act or to make the omission in question." *Held*, affirmed as to liability, but reversed and remanded for a new trial on damages. The word "willful" is used in different statutes with various shades of meaning and must be defined in the context of the particular statute at issue. The Act is a remedial measure, intended for the protection of the consumer, and thus "willful" must be interpreted in a manner that does not vitiate a seller's incentive to comply. Furthermore, the Act establishes a two-tier system of damages for wilful and nonwilful violations, and that distinction must be preserved. Finally, C.C. 1794(c) imposes a civil penalty as punishment and for deterrence, which would not be necessary where a defendant acted in good faith. (23 C.A.4th 184, 185.) Hence, the jury should have been instructed that defendant's failure to refund or replace was not wilful if defendant "reasonably and in good faith believed the facts did not call for refund or replacement." (23 C.A.4th 186.)

The wilfulness issue has been frequently litigated. (See *Schreidel v. American Honda Motor Co. (1995) 34 C.A.4th 1242, 1254, 40 C.R.2d 576* [wilfulness was established where manufacturer made no serious attempt to discover cause of purchaser's complaints, tended to attribute ulterior motives to her, failed to diagnose problems even though she brought car to dealership for repair on six occasions over 11-month period, and, even when it contacted her 2 days

before arbitration, only offered to fix car, not replace it]; *Jensen v. BMW of North America* (1995) 35 C.A.4th 112, 136, 41 C.R.2d 295 [jury's finding of wilfulness was supported by evidence that manufacturer knew car had not been repaired after six attempts over period of nearly 3 years, that it refused to discuss refund option, and that it did not have written policy on replacement or repurchase of vehicles; citing *Kwan* case, supra]; *Oregel v. American Isuzu Motors* (2001) 90 C.A.4th 1094, 1104, 1105, 109 C.R.2d 583 [substantial evidence supported finding of defendant manufacturer's wilful violation of obligation to repair car or refund purchase price; defendant was aware that numerous efforts to find and fix oil leak had been unsuccessful, its policy was not to count visit as repair attempt unless part was repaired or replaced, and additional policies obstructed consumer's ability to obtain redress].)

(3) *Other Illustrations.* In *Mitchell v. Blue Bird Body Co.* (2000) 80 C.A.4th 32, 95 C.R.2d 81, purchasers of a new motor home, asserting that attempts to correct several alleged defects had been unsuccessful, notified the manufacturer of their intent to revoke acceptance of the vehicle. The parties reached a partial settlement involving return of the vehicle, but an unresolved issue went to trial: whether the purchasers could recover their finance charges, which, by the time the lawsuit was filed, constituted the bulk of monies they had paid to acquire the vehicle. The trial judge granted summary judgment for the manufacturer. *Held*, reversed. C.C. 1793.2(d)(2) characterizes the refund remedy as "restitution," and restitution is intended to restore the *status quo ante* as far as is practicable. (80 C.A.4th 36.) A finding that the statute impliedly prohibits recovery of the finance charge would be contrary both to the remedial purpose of the Act and to the statutory description of the remedy as restitution. "A more reasonable construction is that the Legislature intended to allow a buyer to recover the entire amount actually expended for a new motor vehicle, including paid finance charges, less any of the expenses expressly excluded by the statute." (80 C.A.4th 37.)

In *Kwan v. Mercedes-Benz of North America*, supra, the jury's award of damages included an amount for emotional distress. *Held*, this was error. The Act clearly limits compensatory damages to the same categories, and measures them in the same manner, as those normally available to a buyer for a seller's breach of contract for the sale of goods. (23 C.A.4th 188.) "We are not free to ignore this unambiguous indication of intent and supplement the statutory remedies with additional ones drawn from the field of torts." (23 C.A.4th 192.) (See *Bishop v. Hyundai Motor America* (1996) 44 C.A.4th 750, 756, 757, 52 C.R.2d 134 [award of "loss of use" damages was improper where plaintiff did not claim any reimbursable expense or that she lost financial advantage during period she was without replacement vehicle; her "loss of use" claim was akin to one for aggravation or distress, which is not cognizable under Act; citing *Kwan* case, supra].)

West's Key Number Digest, Consumer Protection k.50

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Other Illustrations.* See *Robertson v. Fleetwood Travel Trailers of Calif.* (2006) 144 C.A.4th 785, 814, 50 C.R.3d 731 [conclusion of *Mitchell v. Blue Bird Body Co.* (2000) 80 C.A.4th 32, 95 C.R.2d 81, text, p. 295, that finance charge is recoverable as part of refund remedy in action concerning new vehicle under C.C. 1793.2(d)(2) applies also to actions concerning other products under C.C. 1793.2(d)(1) (text, §318)].



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4 Witkin Sum. Cal. Law Sales § 322

[§ 322] Costs and Attorneys' Fees.

If the buyer prevails in an action under C.C. 1794, the court must allow costs and expenses, including attorneys' fees "based on actual time expended, determined by the court to have been reasonably incurred." (C.C. 1794(d).) (See 4 *Pacific L. J.* 200; 14 *Pacific L. J.* 519; *Troensegaard v. Silvercrest Industries* (1985) 175 C.A.3d 218, 221, 228, 220 C.R. 712 [plaintiff in seeking and recovering "civil penalty" under C.C. 1794(c) and attorneys' fees and costs under C.C. 1794(d) waived any claim for punitive damages]; *Nightingale v. Hyundai Motor America* (1994) 31 C.A.4th 99, 103, 37 C.R.2d 149 [buyer was entitled to attorneys' fees at rate at which she was actually billed, and not at higher rate called for in her fee agreement; fees not actually "incurred" may not be recovered]; *Jensen v. BMW of North America* (1995) 35 C.A.4th 112, 137, 41 C.R.2d 295 [expert witness fees are included in "expenses" allowable under C.C. 1794(d)]; 82 A.L.R.5th 501 [recovery of attorneys' fees under state motor vehicle "lemon laws"].)

In *Murillo v. Fleetwood Enterprises* (1998) 17 C.4th 985, 73 C.R.2d 682, 953 P.2d 858, plaintiff buyer purchased a motor home that subsequently needed various repairs. Finding the repairs unsatisfactory, plaintiff sued the motor home's sellers, under that portion of the Act popularly known as the "lemon law" (supra, §319), for breach of express and implied warranties. Defendants offered to settle for \$ 12,000, with plaintiff to retain possession of the motor home, but plaintiff refused the offer. The jury found for defendants, and the trial judge denied plaintiff's motion to strike defendants' memorandum of costs. *Held*, affirmed.

(a) *As prevailing parties, defendants are entitled to recover their costs under C.C.P. 1032(b).*

(1) Defendants are the undisputed prevailing parties, and C.C.P. 1032(b) grants a prevailing party the right to recover costs "except as otherwise expressly provided by statute." (17 C.4th 989; see 7 *Cal. Proc.* (4th), *Judgment*, §90.) C.C. 1794(d) gives a prevailing buyer the right to recover costs and expenses, including attorneys' fees, but it makes no mention of prevailing sellers. Hence, it does not expressly disallow sellers from recovering their costs. (17 C.4th 991.)

(2) Interpreting C.C.P. 1032(b) to permit prevailing sellers to recover their costs does not render the word "costs" in C.C. 1794(d) surplusage. Instead, C.C. 1794(d) "simply makes clear the breadth of the financial incentive the

Legislature has created to encourage consumers to vindicate their rights under the Act." (17 C.4th 992.)

(3) The two statutes are not inconsistent. C.C. 1794(d) provides for recovery of costs, expenses, and attorneys' fees for buyers who prevail under the Act, while C.C.P. 1032(b) provides for recovery of costs for sellers who do so. Hence, there is no reason to determine whether one statute takes precedence over the other. (17 C.4th 992.)

(4) Until C.C. 1794(d) was amended in 1978 to provide for buyers' costs, recovery of costs under the Act was governed by C.C.P. 1032(b). Nevertheless, the amendment does not indicate a legislative intent to extinguish the right to recover costs that prevailing sellers enjoyed under C.C.P. 1032(b). The new version of C.C. 1794(d) did change previous law, but only by removing a treble damages provision. (17 C.4th 993.)

(5) By allowing prevailing buyers to recover their attorneys' fees, C.C. 1794(d) strongly encourages injured consumers to seek legal redress. It is not for the courts to say that this is insufficient to vindicate the pro-consumer purpose of the Act or that allowing prevailing sellers to recover their costs would undermine that purpose. The extent, if any, to which the playing field should be further tilted in favor of consumers is for the Legislature to determine. (17 C.4th 994.)

(6) *Brown v. West Covina Toyota* (1994) 26 C.A.4th 555, 32 C.R.2d 85, is disapproved to the extent it holds that C.C. 1794(d) constitutes an express exception to the general rule permitting a prevailing party, including a prevailing defendant, to recoup its costs of litigation. (17 C.4th 996.) Other cases cited by plaintiff, including *Dawson v. Westerly Investigations* (1988) 204 C.A.3d Supp. 20, 251 C.R. 633, and *Rogers v. Superior Court* (1993) 19 C.A.4th 469, 23 C.R.2d 412, 2 Cal. Evidence (4th), Witnesses, §286, are inapplicable because they involved statutory cost-shifting schemes that expressly addressed a defendant's ability to recover costs and thus supplanted the general rule of C.C.P. 1032(b). (17 C.4th 997.)

(7) The holding here will not require the Legislature to amend the numerous California statutes that specify only one particular party in their cost recovery provisions. First, a number of these statutes involve recovery of attorneys' fees, an issue that is not addressed here. Second, many of the statutory provisions may constitute express exceptions to C.C.P. 1032(b). (17 C.4th 999.)

(b) *Because plaintiff recovered less than defendants offered in settlement, defendants are entitled to recover their expert witness fees.*

(1) At the time plaintiff filed his action, C.C.P. 998(c) allowed a trial court to impose the costs of the defendant's expert witnesses on the plaintiff, if the plaintiff had previously rejected a settlement offer and then failed to obtain a more favorable judgment. (See 6 Cal. Proc. (4th), *Proceedings Without Trial*, §91.) C.C. 1794(d) provides no exception to C.C.P. 998(c), which explicitly states that it "augments" C.C.P. 1032(b). (17 C.4th 1000.)

(2) Although the Legislature wanted to encourage consumers to enforce their rights under the Act, nothing in C.C. 1794(d) suggests that this purpose should override the policy of encouraging settlement expressed in C.C.P. 998(c). (17 C.4th 1001.)

One justice dissented, stating that the majority's holding is irreconcilable with the strongly pro-consumer legislative purpose of the Act, and that the Act's specific cost provisions "occupy the field," making it unnecessary for the Legislature to specify that a prevailing seller may not recover costs. (17 C.4th 1003, 1004.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Duale v. Mercedes-Benz USA, LLC* (2007) 148 C.A.4th 718, 724, 56 C.R.3d 19 [in action under Song-Beverly Consumer Warranty Act in which plaintiffs, two car buyers, rejected defendant seller's compromise offer and then obtained judgment for less than amount defendant offered, trial judge erred in refusing to apply C.C.P. 998 to limit plaintiffs to recovery of their pre-offer fees and costs]. *Prevailing party's right to recover costs:*

Cross-Reference: 7 Cal. Proc. (5th), Judgment, §89. Expert witness fees:

Cross-Reference: 6 Cal. Proc. (5th), Proceedings Without Trial, §110.



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3. Remedies Available Only to New Motor Vehicle Purchasers.

4 Witkin Sum. Cal. Law Sales § 323

[§ 323] Remedies Available Only to New Motor Vehicle Purchasers.

A new motor vehicle purchaser establishing a violation of C.C. 1793.2(d)(2) (supra, §318) is entitled to recover damages and reasonable attorneys' fees and costs, and may be entitled to a civil penalty of up to two times the amount of damages. (C.C. 1794(e)(1).) However, a manufacturer will not be liable for a civil penalty under any of the following circumstances:

(1) The manufacturer maintains a qualified third-party dispute resolution process substantially complying with C.C. 1793.22. (C.C. 1794(e)(2).)

(2) The buyer fails to serve notice requiring the manufacturer to comply with C.C. 1793.2(d)(2), after the occurrence of events giving rise to the presumption established in C.C. 1793.22(b) (supra, §319). (C.C. 1794(e)(3).)

(3) The manufacturer complies with C.C. 1793.2(d)(2) within 30 days after the buyer serves notice under C.C. 1794(e)(3). (C.C. 1794(e)(4).)

(4) The buyer recovers a civil penalty under C.C. 1794(c) (supra, §321) for the same violation. (C.C. 1794(e)(5).)

Where a buyer is unable to recover a penalty under C.C. 1794(e) because one of the above exceptions applies, recourse to C.C. 1794(c) may still be possible. (*Jernigan v. Ford Motor Co.* (1994) 24 C.A.4th 488, 492, 29 C.R.2d 348, supra, §321; see *Suman v. BMW of North America* (1994) 23 C.A.4th 1, 11, 28 C.R.2d 133 [unlike civil penalty provision of C.C. 1794(c), civil penalty provision of C.C. 1794(e) contains no wilfulness requirement]; *Suman v. Superior Court* (1995) 39 C.A.4th 1309, 1321, 1323, 46 C.R.2d 507 [setting forth appropriate jury instructions for C.C. 1794(e) and relying on *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1, 6 Summary (10th), Torts, §1567, to find that statute does not deprive defendant of due process by failing to provide adequate standards by which jury can determine whether to impose civil penalties].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Dominguez v. American Suzuki Motor Corp.* (2008) 160 C.A.4th 53, 60, 72 C.R.3d 354 [attorneys' fees and civil

penalties under C.C. 1794(e) were not available to motorcycle purchaser who alleged manufacturer refused to repurchase motorcycle in violation of C.C. 1793.2(d)(2); motorcycle does not qualify as new motor vehicle under statute]; on protections for new motor vehicles purchasers who are members of the Armed Forces, see Supp., supra, §314.



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4 Witkin Sum. Cal. Law Sales § 324

[§ 324] Action by Seller or Independent Service Person.

A retail seller or an "independent serviceman of consumer goods" injured by a wilful or repeated violation of the Act may also bring an action for damages. The judgment may include three times the amount of actual damages, plus reasonable attorneys' fees. (C.C. 1794.1; Cal. Civil Practice, 5 Business Litigation, §53:53; Cal. Transactions Forms, 5 Business Transactions §33:38.)

SUPPLEMENT: [This section is current through the latest supplement]



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e. Tolling of Warranty Period.

4 Witkin Sum. Cal. Law Sales § 325

[§ 325] Tolling of Warranty Period.

All warranty periods on goods selling for \$ 50 or more are tolled, from the date the buyer delivers the goods for warranty repairs or notifies the manufacturer or seller of their nonconformity until the date the repaired or serviced goods are returned or made available to the buyer. (C.C. 1795.6(a).) The manufacturer or seller must provide receipts or records of these dates and of the date of purchase. (C.C. 1795.6(d).)

A warranty period will not expire if either or both of the following situations occur: (1) the buyer delivers nonconforming goods for warranty repair or service, or gives notification of the nonconformity, but the work is not performed due to no fault of the buyer, or (2) the work performed does not remedy the nonconformity, and the buyer notifies the manufacturer or seller of that fact within 60 days. Upon completion of the work, the warranty period, including any extension thereof, expires in accordance with its terms. (C.C. 1795.6(b); see *12 Pacific L. J. 317*; Cal. Civil Practice, 5 Business Litigation, §53:43.)

The manufacturer's liability to the seller under a tolled warranty is extended for the period of tolling. (C.C. 1795.7.) (See *6 Pacific L. J. 239*; Cal. Civil Practice, 5 Business Litigation, §53:25.)

SUPPLEMENT: [This section is current through the latest supplement]



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f. Service Contract in Lieu of Express Warranty.

4 *Witkin Sum. Cal. Law Sales* § 326

[§ 326] Service Contract in Lieu of Express Warranty.

(1) *In General.* A service contract may be sold to the buyer in addition to or in lieu of an express warranty, provided that the service contract "fully and conspicuously discloses in simple and readily understood language the terms, conditions, and exclusions of that contract." (C.C. 1794.4(a) [statute does not apply to a home protection contract issued by a home protection company that is subject to *Ins.C. 12740* et seq.]; on home protection contracts, see *infra*, §363.)

A service contract is a *written* contract "to perform, for an additional cost, over a fixed period of time or for a specified duration, services relating to the maintenance, replacement, or repair of a consumer product." (C.C. 1791(o) [excluding automobile insurance policies as defined in *Ins.C. 116*].) It is not an express warranty within the meaning of the Song-Beverly Consumer Warranty Act (*supra*, §314). The legislative history of the Act makes clear that the Legislature thought of service contracts and express warranties as mutually exclusive categories, except where the service contract in question uses the terms "warranty" or "guarantee." (*Gavaldon v. DaimlerChrysler Corp.* (2004) 32 C.4th 1246, 1259, 13 C.R.3d 793, 90 P.3d 752 [after express 3-year warranty on minivan expired, fact that 7-year service contract was still in effect at time manufacturer and its representatives were unable to repair transmission defect did not make available to purchaser replacement/restitution remedy of C.C. 1793.2(d)(2), *supra*, §318].)

Except as otherwise expressly provided in the service contract, every service contract obligates the service contract seller to provide the buyer, without additional charge, all parts and services necessary to maintain proper operation for the duration of the contract. (C.C. 1794.4(b).) The service contract must contain certain specified items of information, including a description and identification of the covered product; the contract's duration; the transferability or assignability of the contract; a statement of the service contract seller's obligations; an explanation of the procedure for obtaining performance by the service contract seller, and of the steps a service contract seller must take to carry out its obligations; a description of the buyer's cancellation rights; and information concerning the availability of any informal dispute settlement process. (C.C. 1794.4(c).)

(2) *Motor Vehicles, Home Appliances, and Home Electronic Products.* A service contract covering a *motor vehicle*, a *home appliance*, or a *home electronic product* purchased for use in California may be offered for sale or sold if (a) in addition to the disclosures specified in C.C. 1794.4, *supra*, the contract discloses the buyer's cancellation and refund rights; (b) the contract is made available to the buyer for inspection prior to purchase, and the buyer receives at or

before the time of purchase the contract or a brochure describing the contract's terms, conditions, or exclusions, as well as the statutory provisions relating to contract delivery, cancellation, and refund; (c) the contract is cancelable by the buyer. (C.C. 1794.41 [specifying conditions for cancellation and refund]; see *17 Pacific L. J.* 655; Cal. Transactions Forms, 5 Business Transactions §33:39.)

The contract may apply only to items, costs, and time periods not covered by the express warranty. However, a service contract may run concurrently with or overlap an express warranty if the contract (a) covers items or costs not covered by the express warranty, or (b) provides relief to the buyer not available under the express warranty. (C.C. 1794.41 [statute does not apply to home protection plans issued by home protection companies subject to *Ins.C. 12740 et seq.*].) In the case of any conflict between C.C. 1794.41 and *Ins.C. 12800 et seq.*, *infra*, this section, the Insurance Code provision prevails. (C.C. 1794.41.)

(3) *Vehicle Service Contracts Under Insurance Code.* *Ins.C. 12800 et seq.* create a type of service contract specifically applicable to motor vehicles (defined in *Ins.C. 12800(a)*) and watercraft (defined in *Ins.C. 12800(b)*). A vehicle service contract is an agreement for a separately stated consideration and for a specific duration to repair, replace, or maintain a motor vehicle or watercraft, or to indemnify for the repair, replacement, or maintenance of a motor vehicle or watercraft because of an operational or structural failure due to a defect in materials or workmanship, or due to normal wear and tear. It may also provide for the incidental payment of indemnity in the form of coverage for towing, substitute transportation, emergency road service, rental car reimbursement, road hazard protection, reimbursement of deductible amounts under a manufacturer's warranty, and reimbursement for travel, lodging, or meals. A vehicle service contract "also includes an agreement, for separately stated consideration, that promises repairs at a discount to the purchaser for any combination of parts and labor in excess of 20 percent." (*Ins.C. 12800(c)*.) Vehicle service contracts that comply with *Ins.C. 12800 et seq.* do not constitute insurance. (*Ins.C. 12805*.) The following requirements are applicable:

(a) Only a seller may sell, or offer for sale, a vehicle service contract to a purchaser. (*Ins.C. 12810*.)

(b) An obligor (defined in *Ins.C. 12800(g)*) as "the entity legally obligated under the terms of a service contract" who is not a seller must possess a vehicle service contract provider license. (*Ins.C. 12815*.) The obligor must, prior to incurring any obligation under a vehicle service contract, file with the Insurance Commissioner a copy of an insurance policy covering 100% of the obligor's vehicle service contract obligations. The Commissioner's approval of the policy is required. (*Ins.C. 12830*.)

(c) Before offering a vehicle service contract form to a purchaser or providing a vehicle service contract form to a seller, an obligor must file a specimen of the form with the Insurance Commissioner. (*Ins.C. 12820(a)*; for requirements applicable to such forms, see *Ins.C. 12820(b)*.)

(d) An obligor may cancel the contract under specified circumstances, including nonpayment or material misrepresentation or fraud by the purchaser. (*Ins.C. 12825*.)

(e) If an insurer cancels a policy that has been filed with the Commissioner pursuant to *Ins.C. 12830*, *supra*, the obligor must file a new policy or discontinue acting as an obligor, but the obligor is not relieved of any obligation incurred under contracts issued prior to the date the policy was terminated. (*Ins.C. 12835*.)

(f) An obligor has the burden of proving that a claim is not covered by a vehicle service contract, and that a claim settlement amount is proper. (*Ins.C. 12850*.)

(g) Obligors and service contract administrators (defined in *Ins.C. 12800(d)*), but not "a seller who is an obligor under vehicle service contracts it sells," may be held criminally liable for violating *Ins.C. 12815*, *12830*, *12835*, *supra*. The Commissioner may also issue cease and desist orders. (*Ins.C. 12845*.)

Ins.C. 12800 et seq. also create refund agreements, which are not the same as vehicle insurance contracts. Under

Ins.C. 12865, a refund agreement is a "promise to refund some or all of the purchase price of a service contract if the purchaser does not file any claims, files a limited number of claims, or files claims the dollar amount of which does not exceed a set amount or percentage." The agreement must additionally satisfy the requirements of *Ins.C. 12865(a)*, (b). Many of the requirements applicable to vehicle service contracts also apply to refund agreements. (See *Ins.C. 12860(b)*, (c).)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Vehicle Service Contracts Under Insurance Code. Ins.C. 12800(c)* was amended in 2007. The portion of the subdivision quoted in the text was changed to read: "also includes an agreement of a term of at least one year, for separately stated consideration, that promises routine maintenance." The amendment also identifies the following additional kinds of agreements as vehicle service contracts:

(a) An agreement promising the repair or replacement of glass or a tire or wheel that is necessitated by wear and tear, defect, or damage caused by a road hazard. However, an agreement of this type by a tire or glass *manufacturer* is not included, and, under specified circumstances, a warranty provided by a distributor or retailer of glass, tires, or wheels is excluded as well.

(b) An agreement promising the removal of dents, dings, or creases without affecting the existing paint finish using paintless dent repair techniques, provided that the agreement expressly excludes the replacement of vehicle body panels, sanding, bonding, or painting.(b) *License and proof of insurance: Ins.C. 12836*, added in 2007, provides that, in lieu of satisfying the proof of insurance requirement of *Ins.C. 12830* (text, p. 302), the obligor or its parent company may establish, to the Insurance Commissioner's satisfaction, that it has a net worth of \$ 100 million.



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4 Witkin Sum. Cal. Law Sales § 327

[§ 327] Magnuson-Moss Warranty Act.

The Magnuson-Moss Warranty Act (15 U.S.C., §2301 et seq.) regulates written warranties (supra, §56) on consumer goods manufactured after July 4, 1975 (15 U.S.C., §2312), and distributed in interstate commerce. (See *Kanter v. Warner-Lambert Co.* (2002) 99 C.A.4th 780, 797, 798, 122 C.R.2d 72 [drug regulated by Food, Drug, and Cosmetic Act (21 U.S.C., §301 et seq.) is not consumer product within meaning of Magnuson-Moss Warranty Act]; see generally 13 Cal. Western L. Rev. 391; 18 Santa Clara L. Rev. 73; 26 U.C.L.A. L. Rev. 648; Clark & Smith, The Law of Product Warranties, Chap. 14 et seq.; 17 Am.Jur.2d (1990 ed.), Consumer Product Warranty Acts §1 et seq.)

As implemented by regulations of the Federal Trade Commission (16 C.F.R. §701.1 et seq.), the Act prescribes the content of warranties (15 U.S.C., §2302(a)), regulates their presale disclosure to consumers (15 U.S.C., §2302(b)), restricts "tie-in" conditions upon warranties (15 U.S.C., §2302(c)), imposes differing requirements upon "full" and "limited" warranties (15 U.S.C., §2303 et seq.), and subjects disclaimers or modifications of implied warranties to restrictions (15 U.S.C., §2308) which, however, are largely superseded by the stricter limitations of California law (15 U.S.C., §2311(b)(1); see supra, §§52, 90).

Consumers are given a federal cause of action for damages resulting from violation of the Act or of a warranty or service contract regulated by the Act, upon which they may sue in an appropriate state or federal court. (15 U.S.C., §2310(d); see 66 Cal. L. Rev. 1; 59 A.L.R. Fed 461 [consumer product warranty suits in federal court under Act].) However, the Act and regulations permit suppliers to provide informal dispute settlement procedures that consumers must exhaust before bringing suit. (15 U.S.C., §2310(a); 16 C.F.R. §703.1 et seq.; see 52 So. Cal. L. Rev. 235 [Incentives for Warrantor Formation of Informal Dispute Settlement Mechanisms]; Cal. Transactions Forms, 5 Business Transactions §33:3 et seq.)

The Federal Trade Commission and the Attorney General are empowered to obtain injunctive relief against violators. (15 U.S.C., §2310(c).)

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See C.E.B., Law of Contracts §6.30. *Federal cause of action for damages:* See *Atkinson v. Elk Corp. of Texas* (2006)

142 C.A.4th 212, 231, 48 C.R.3d 247 [cause of action for breach of implied warranty under Magnuson-Moss Warranty Act was barred because alleged breach occurred after expiration of implied warranty period set forth in C.C. 1791.1 (implied warranty of merchantability is coextensive in duration with express warranty but may not be longer than 1 year), which is applicable to actions under the Act].



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4 Witkin Sum. Cal. Law Sales § 328

[§ 328] Solicitation in Form of Invoice.

A common fraudulent practice consists of sending mailed solicitations for the sale of goods or services in such form that the recipient mistakes them for an invoice for obligations already incurred and unthinkingly makes payment of the stated sum. To supplement the criminal process (false advertising; see 2 *Cal. Crim. Law* (3d), *Crimes Against Property*, §212 et seq.), C.C. 1716 outlaws the practice and provides penalties as follows:

(1) *Practice Prohibited*. It is unlawful "to solicit payment of money by another by means of a written statement or invoice, or any writing that reasonably could be considered a bill, invoice, or statement of account due, but is in fact a solicitation for an order," unless the solicitation carries a disclaimer or notice conforming to the requirements of the statute. (C.C. 1716(a).)

(2) *Warning*. The solicitation must contain, "in conspicuous boldface capital letters of a color prominently contrasting with the background against which they appear" and in no smaller than 30-point type, either the disclaimer prescribed by 39 U.S.C., §3001(d)(2)(A) or the following notice: "THIS IS NOT A BILL. THIS IS A SOLICITATION. YOU ARE UNDER NO OBLIGATION TO PAY THE AMOUNT STATED ABOVE UNLESS YOU ACCEPT THIS OFFER." (C.C. 1716(b).) C.C. 1716(c), (d), (e) impose additional requirements relating to placement, so as to render the disclaimer or notice as conspicuous as possible. (For definition of "color" and "color prominently contrasting," see C.C. 1716(f).)

(3) *Remedies*. A person damaged by noncompliance with the statute, in addition to other remedies, may recover damages in an amount equal to three times the sum solicited. (C.C. 1716(g).)

(4) *Penalties*. A violator of the statute may be assessed a civil penalty not to exceed \$ 10,000 for each violation in an action brought by the Attorney General, a district attorney, county counsel, or city attorney. (C.C. 1716(h).) Each violation is also a misdemeanor punishable by imprisonment in a county jail not exceeding 6 months, a fine not exceeding \$ 2,500, or both. (C.C. 1716(i).)

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12. Home Solicitation.

a. Buyer's Right To Cancel.

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[§ 329] Buyer's Right To Cancel.

(1) *In General.* C.C. 1689.5 et seq. were enacted in 1971 to protect consumers from abusive practices in door-to-door sales by allowing a buyer to cancel a home solicitation contract or offer. (See 3 *Pacific L. J.* 633; 16 *U.C.L.A. L. Rev.* 895 [extensive study of the home sales industry]; Cal. Civil Practice, 5 Business Litigation, §52:25 et seq.; on "cooling-off" statutes in other states and countries, see 15 *U.C.L.A. L. Rev.* 717; 16 *U.C.L.A. L. Rev.* 1007; 3 West L.A. L. Rev. 126.) The provisions of these sections cannot be waived. (C.C. 1689.12.)

(2) *Contracts Covered.* The statute applies to any contract, or offer which is subject to approval, for the sale, lease, or rental of goods or services, which is "made at other than appropriate trade premises" and which costs \$ 25 or more, including interest or service charges. (C.C. 1689.5(a).) There are, however, a number of exclusions:

(a) Sales of goods affixed to real property that is subsequently sold or encumbered. (C.C. 1689.9.)

(b) Emergency repairs or services where the buyer (or the buyer's agent or insurance representative) initiates the contract and executes a separate statement describing the emergency and waiving the right to cancel. (C.C. 1689.13; see 5 *Pacific L. J.* 303.)

(c) Contracts that grant the buyer the right to rescind under the federal Consumer Credit Protection Act (supra, §242). (C.C. 1689.5(a).)

(d) Contracts or offers to sell vehicles required to be registered under the Vehicle Code, or mobilehomes within the meaning of *Health & Saf.C. 18008*. (C.C. 1689.5(c).)

(e) Services of a number of listed professional occupations; financial services offered by various institutions; the sale of insurance not connected with the sale of goods or services; services in connection with the sale or installation of mobilehomes; and services for which tariffs, rates, charges, costs, or expenses are required to be filed with and approved by the state or federal government. (C.C. 1689.5(d); see *Williams v. Kapilow & Son* (1980) 105 *C.A.3d* 156, 161, 164 *C.R.* 176, infra, §330 [rejecting equal protection challenge to the statute based on the exempted occupations].)

(3) *Time and Manner of Cancellation.* The buyer has the right to cancel the purchase agreement until midnight of

the third day (exclusive of Sundays and specified holidays) after signing. Rescission is accomplished by giving written notice in any form sufficient to indicate the intention not to be bound. (C.C. 1689.5(e), 1689.6; see 5 *Pacific L. J.* 303.) Different cancellation rights and requirements apply to home improvement contracts (C.C. 1689.6(a)(2); supra, §290), service and repair contracts (C.C. 1689.6(a)(3); supra, §290), contracts or offers to purchase a personal emergency response unit (C.C. 1689.6(b)), and contracts or offers to repair or restore residential premises damaged by a disaster (C.C. 1689.6(c), 1689.14).

(4) *Return of Consideration.* The seller must return any goods traded in and any payment or notes or other evidence of indebtedness. (C.C. 1689.10.) The buyer must tender the goods on demand within 20 days after cancellation; if no demand is made the goods become the buyer's property without obligation. (C.C. 1689.11; see 6 *Pacific L. J.* 167.)

(5) *Form and Contents of Contract.* The contract must be written in the same language (e.g., Spanish) as the oral presentation. (C.C. 1689.7(a)(1).) The buyer's right to cancel must be conspicuously stated (in at least 10-point bold type) in the agreement in immediate proximity to the space reserved for the buyer's signature. (C.C. 1689.7(a)(1).) Detailed notice of the buyer's protections outlined above must also be set forth in the agreement. (C.C. 1689.7(c).) The buyer must be given a copy of the contract with a detachable "Notice of Cancellation" form showing the seller's address and the time the right to cancel expires. (C.C. 1689.7(c).) In addition, the cancellation right must be orally explained. (C.C. 1689.7(f).) Until these requirements are complied with, the buyer can cancel at any time. (C.C. 1689.7(g); see also C.C. 1689.7(a)(2), (d) [special requirements pertaining to personal emergency response units]; C.C. 1689.7(a)(3), (e)(1) [special requirements pertaining to contracts or offers to repair or restore residential premises damaged by disaster]; C.C. 1689.7(a)(4), (e)(2) [special requirements pertaining to home improvement contracts]; C.C. 1689.7(a)(5), (e)(3) [special requirements pertaining to service and repair contracts]; *Handyman Connection of Sacramento v. Sands* (2004) 123 C.A.4th 867, 883, 20 C.R.3d 727 [document entitled "labor estimate" was subject to C.C. 1689.7 because it contained all elements of home solicitation contract and both parties performed in accordance with it; thus, contractor was properly cited for failing to include notice of cancellation right]; on seller's right to recover in quasi-contract for benefits conferred where seller failed to include in contract notice of right to cancel, and buyer cancels after completion of work, see *Beley v. Municipal Court* (1979) 100 C.A.3d 5, 160 C.R. 508, 1 Summary (10th), *Contracts*, §1042.)

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SUPPLEMENT: [This section is current through the latest supplement]

(5) *Form and Contents of Contract.* C.C. 1689.7(e) was amended in 2005. The portions relating to home improvement contracts and service and repair contracts were deleted, and the remaining portion, relating to home solicitation contracts to repair or restore residential premises damaged by disaster, now occupies the whole of the subdivision.



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b. What Constitutes Home Solicitation.

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[§ 330] What Constitutes Home Solicitation.

In *Weatherall Aluminum Products Co. v. Scott* (1977) 71 C.A.3d 245, 139 C.R. 329, defendants, having obtained plaintiff company's name and number from the telephone directory, telephoned plaintiff, and plaintiff sent a representative to defendants' home, where the agreement was made. *Held*, the statute applied, and the contract, lacking a provision giving the buyers the right to cancel, was unenforceable and subject to cancellation. (1) Although the typical situation involves the uninvited appearance of a salesman at the buyer's home, an equally serious pressure may be present when the salesman is invited to come. "A reluctant buyer can easily walk away from a seller's place of business, but he cannot walk away from his own home, and he may find that the only practical way of getting the seller to leave is to agree to buy what the seller is selling." (71 C.A.3d 248.) (2) The court left open the question whether the statute applies to a contract negotiated at "appropriate trade premises" but signed at the buyer's home for reasons of either party's convenience. (71 C.A.3d 248.)

The statute was also held applicable in *Louis Luskin & Sons v. Samovitz* (1985) 166 C.A.3d 533, 212 C.R. 612, where a couple who owned a vacant rental house summoned a plumbing firm to that house and signed a contract for replacement of a sewer line. "[T]he test for applicability of the statute is not whether the contract is made at the buyer's home but whether it is made somewhere other than the seller's place of business. The statute applies to deals made at swap meets, in airplanes or at property owned by the buyer but not used as a residence, as in the case at bench." (166 C.A.3d 536.)

In *Williams v. Kapilow & Son* (1980) 105 C.A.3d 156, 164 C.R. 176, plaintiff's home burned down, and the same day two agents of defendant, a public insurance adjusting firm, appeared unsolicited at the demolished home and contracted with him to negotiate his claims against his fire insurance carrier. *Held*, the contract was within the statute, and unenforceable because it contained no notice of the homeowner's right to cancel. The court rejected defendant's contention that the Act covered only door-to-door solicitations, and not its solicitations directed only to potential customers who had suffered an insured loss. "Having arrived, unbidden, at plaintiff's residence on the very day his home burned down, a time at which plaintiff was undoubtedly under serious emotional stress, defendant cannot escape the strictures of the statute merely because its agents did not also knock on other doors on the block." (105 C.A.3d 161.)

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c. Disclosure of Identity and Purpose.

4 Witkin Sum. Cal. Law Sales § 331

[§ 331] Disclosure of Identity and Purpose.

A person making a home solicitation must disclose the following information before making any statement other than a greeting: (1) his or her identity, (2) the trade name of the person he or she represents, and (3) the kind of goods or services being offered. The person making the solicitation must also show or display identification disclosing this information. (*B. & P.C. 17500.3(a)*.)

In addition to criminal liability imposed on sellers for violation of these provisions, the buyer is entitled to damages if the violation was intentional, and if the buyer has unsuccessfully demanded in writing that the contract be terminated and any payment returned. Damages are two times the amount of the sale price or \$ 250, whichever is greater, but in no case less than \$ 50. (*B. & P.C. 17500.3(c)*.)

B. & P.C. 17500.3(a) formerly imposed liability for failure to furnish identification only if the buyer actually entered into a purchase agreement. Although this limitation was eliminated in 1975, recovery of the damages specified above for intentional violations is possible only where a contract has been entered into. Thus, where no sale is made, the only penalties for failure to furnish identification are provided by *B. & P.C. 17534* (violation is a misdemeanor) and *B. & P.C. 17535* (providing for injunctive relief). (See 7 *Pacific L. J.* 345 [arguing that to protect consumers from nuisance of door-to-door salesmen, damages should be recoverable even if the consumer does not enter into a contract].)

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13. Repair Services.

a. Automobiles and Farm Machinery.

4 *Witkin Sum. Cal. Law Sales* § 332

[§ 332] Automobiles and Farm Machinery.

(1) *Automobiles*. The Automotive Repair Act (*B. & P.C. 9880* et seq.) provides for the registration and regulation of automotive repair dealers. (See 3 *Pacific L. J.* 284.) Injunctive or other relief is available for violation of the Act (*B. & P.C. 9884.14*), and criminal penalties are provided (*B. & P.C. 9889.20, 9889.21*). It is unlawful for any person to be an automotive repair dealer unless he or she is duly registered (*B. & P.C. 9884.6*), and the Act provides for the refusal to validate or the invalidation of registration for specified wrongful acts (*B. & P.C. 9884.7*). Regulatory provisions designed to protect the consumer include the following:

(a) The dealer must provide an invoice stating all work done and parts supplied and including a specification of any used, rebuilt, or reconditioned parts that were used. The invoice must list separately the service work and parts and the subtotal prices, and the sales tax, if any, for each must be separately stated. Additionally, the invoice must specify whether any crash parts used are original equipment manufacturer crash parts or nonoriginal equipment manufacturer aftermarket crash parts. (*B. & P.C. 9884.8*; see *B. & P.C. 9875(b)* [defining "aftermarket crash part" as a replacement for any of the nonmechanical sheet metal or plastic parts that constitute the vehicle's exterior].)

(b) The customer must be given a written estimate of all parts and labor, and no work may be done until the customer authorizes it. The customer may not be charged for parts or labor in excess of the estimated price except upon his or her oral or written consent. (*B. & P.C. 9884.9(a)*; see *Bennett v. Hayes* (1975) 53 *C.A.3d* 700, 703, 125 *C.R.* 825 [recovery for work done was barred by failure to give written estimate]; *Schreiber v. Kelsey* (1976) 62 *C.A.3d Supp.* 45, 49, 133 *C.R.* 508 [same]; *Donaldson v. Abot* (1987) 194 *C.A.3d* 817, 821, 239 *C.R.* 801 [repair dealer's failure to give initial written estimate barred recovery for work performed, even though owners of automobile had authorized repairs]; 5 *Pacific L. J.* 315; 9 *Southwestern U. L. Rev.* 759 [*Bennett v. Hayes*]; 5 *A.L.R.4th* 311 [liability to pay for unauthorized repairs]; 25 *A.L.R.4th* 506 [duty to provide customer with information, estimates, or replaced parts].) Punitive damages may be awarded for "flagrant violations" of *B. & P.C. 9884.9(a)*. (See *Zhadan v. Downtown L.A. Motors* (1976) 66 *C.A.3d* 481, 497, 136 *C.R.* 132, 6 *Summary* (10th), *Torts*, §1622; *Harris v. Dixon Cadillac Co.* (1982) 132 *C.A.3d* 485, 494, 183 *C.R.* 299; 23 *A.L.R.4th* 274 [repairer's liability for unauthorized, unnecessary, or fraudulent repairs].)

(c) The dealer's written estimate must include a statement of any repairs that will be done by someone other than the dealer or the dealer's employees. The customer must consent to this outside service unless the customer cannot

reasonably be notified, and the dealer is responsible for the service as if the dealer or the dealer's employees had performed it. (*B. & P.C. 9884.9(b)*; see 5 *Pacific L. J.* 316.)

(d) When doing auto body or collision repairs, the dealer must provide the customer with an itemized written estimate for all parts and labor. The estimate must describe labor and parts separately and, in the case of each part, indicate whether the replacement is new, used, rebuilt, or reconditioned. Each crash part used must be identified on the written estimate as either an original equipment manufacturer crash part or a nonoriginal equipment manufacturer aftermarket crash part. (*B. & P.C. 9884.9(c)*.)

(e) The customer may designate another person to authorize work or parts supplied in excess of the estimated price, if the designation is made in writing at the time the initial authorization to proceed is signed by the customer. "For the purposes of this section, a designee shall not be the automotive repair dealer providing repair services or an insurer involved in a claim that includes the motor vehicle being repaired, or an employee or agent or a person acting on behalf of the dealer or insurer." (*B. & P.C. 9884.9(d)*.)

(f) Replaced parts must be returned to the customer on request. (*B. & P.C. 9884.10*.)

(2) *Farm Machinery*. C.C. 1718, relating to work performed by a farm machinery repair shop, is less comprehensive than the Automotive Repair Act, *supra*, and no registration is required. However, all service work done and parts supplied must be recorded on an invoice. If there is an agreed total cost for a particular job or for replacement of a component unit, the invoice need only record the work done on this basis and its total cost. (C.C. 1718(b).) And the shop must, on request, give the customer a written estimated price for parts and labor and cannot charge for any excess in the absence of the customer's consent. (C.C. 1718(c); see 5 *Pacific L. J.* 317.)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Automobiles*. See C.E.B., Professional Licensing, Chap. 15; on limitations periods applicable to accusations against automotive repair dealers, see *B. & P.C. 9884.20*, added in 2007.



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b. Electronic Equipment and Appliances.

4 *Witkin Sum. Cal. Law Sales* § 333

[§ 333] Electronic Equipment and Appliances.

(1) *Service Dealers Regulated.* The Electronic and Appliance Repair Dealer Registration Law (*B. & P.C. 9800 et seq.*) provides for the registration and regulation of service dealers who (a) repair, service, or maintain an electronic set (defined in *B. & P.C. 9801(h)*) to include television, radio, audio or video recorders or playback equipment, video cameras, video games, video monitors, computer systems, photocopiers, or facsimile machines normally used or sold for personal, family, household, or home office use); (b) install, repair, service, or maintain (1) equipment or a burglar alarm system for use in private motor vehicles or (2) television or radio receiver antennas, rotators, and accessories or direct satellite signal receiving equipment on or adjacent to a residence and not regulated by the Contractors License Law; or (c) repair, service, or maintain major appliances. (*B. & P.C. 9801(f).*)

(2) *Definitions.* Definitions are provided for a number of terms, such as "equipment" (*B. & P.C. 9801(g)*), "electronic set" (*B. & P.C. 9801(h)*), "appliance" (*B. & P.C. 9801(i)*), "antenna" (*B. & P.C. 9801(j)*), "rotator" (*B. & P.C. 9801(k)*), "accessories" (*B. & P.C. 9801(l)*), "computer system" (*B. & P.C. 9801(m)*), "video game" (*B. & P.C. 9801(n)*), "direct satellite signal receiving equipment" (*B. & P.C. 9801(o)*), "electronic repair industry" (*B. & P.C. 9801(p)*), and "appliance repair industry" (*B. & P.C. 9801(q)*).

(3) *Dealer Registration.* It is unlawful for any person required to be registered to act as a service dealer without a valid registration. (*B. & P.C. 9840*; see *B. & P.C. 9802* [persons exempt].) The Director of Consumer Affairs may refuse to validate or may invalidate the registration of a dealer who commits specified wrongful acts. (*B. & P.C. 9841.*)

(4) *Customer Protections.* Regulatory provisions for the protection of the customer include: (a) All service work done and parts supplied must be recorded on an invoice and a copy given to the customer. Used parts must be clearly specified. (*B. & P.C. 9842.*) (b) Replaced parts must be returned to the customer, unless they are exempted by regulations of the Director or are required by a warranty agreement to be returned to the manufacturer or distributor. (*B. & P.C. 9843.*) (c) A written estimate of the cost of parts and labor must be given to the customer, and the dealer may not make any additional charge without the prior consent of the customer. (*B. & P.C. 9844* [allowing reasonable fee for making estimate].) (d) A dealer may not make the compensation of any person dependent upon the value of parts replaced. (*B. & P.C. 9845.*) (See also *C.C. 1858 et seq.* [customer must be given written receipt, including statement of any lack of insurance coverage, for property left for repair].)

(5) *Remedies for Dealer Violations.* The Director is authorized to receive and proceed upon consumer complaints (*B. & P.C. 9860 et seq.*) and to seek injunctive or other relief for violation of the law (*B. & P.C. 9851*). Criminal penalties are also provided. (*B. & P.C. 9850.*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Service Dealers Regulated.* The Electronic and Appliance Repair Dealer Registration Law also regulates service contractors (see *B. & P.C. 9855 et seq.*), but these provisions are scheduled to expire in 2013. (*B. & P.C. 9855.9*, as amended in 2007.)

(3) *Dealer Registration.* *B. & P.C. 9841*, as amended in 2007, no longer refers to validation or invalidation of registration but instead refers to denial, suspension, revocation, or placement on probation. (See C.E.B., Professional Licensing, §16:18.)



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[§ 334] Upholsterers.

B. & P.C. 19162 and *19163* regulate contracts of custom upholsterers, who are licensed by the Bureau of Home Furnishings (*B. & P.C. 19052*).

Before commencing any job, the upholsterer must give the customer a written estimate of the price of necessary labor and materials and a work order stating how long the estimate will remain effective, describing the work to be done and materials to be used, and identifying any secondhand materials as such. No work may be performed prior to authorization from the customer, whose consent is also a prerequisite to the accrual of any charges in excess of the estimate or for work or materials not specified in the work order. (See 5 *Pacific L. J.* 318.)

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d. Noncommercial Aircraft.

4 *Witkin Sum. Cal. Law Sales* § 335

[§ 335] Noncommercial Aircraft.

B. & P.C. 9790 et seq. regulate repairs and services provided to owners of noncommercial aircraft as follows:

(1) *Repairs Covered.* The statutes apply to work done on general aviation aircraft (defined in *B. & P.C. 9790(d)* to exclude air carrier and military aviation aircraft) where the estimated repair cost is at least \$ 100. (*B. & P.C. 9791.*)

(2) *Customer Authorization Required.* Repair work may not begin without specific authorization from the customer, who must be given *either* a written estimate of the price for parts and labor, or a written estimate of the *maximum* cost for a specific job. Additional work requires the customer's separate oral or written consent. (*B. & P.C. 9793* [providing also for estimates where disassembly is required].) Repairpersons may also obtain a customer's authorization to work on a "time and materials" basis. (*B. & P.C. 9797.*)

(3) *Unforeseen Work.* A repairperson who gives an original estimate in good faith is not obligated to complete a job within the estimated price if additional, unforeseen work becomes necessary to complete the job, and the customer withholds consent to pay for that work. (*B. & P.C. 9794.*)

(4) *Recordation on Invoice.* All work must be recorded on an invoice that describes the work done and the parts supplied. (*B. & P.C. 9795.*) The invoice must also show the repairperson's business name and address. (*B. & P.C. 9796.*)

(5) *Compliance Necessary To Obtain Lien.* Failure to comply with *B. & P.C. 9793 et seq.* precludes a repairperson from obtaining a lien on an aircraft for compensation for services rendered. (*B. & P.C. 9798.1(h)*; on repairperson's aircraft lien, see 13 *Summary* (10th), *Personal Property*, §243.)

(6) *Emergency Repairs Excluded.* *B. & P.C. 9793 et seq.* do not apply to aircraft in distress and in need of immediate work critical to the aircraft's preservation and safety, where consent to repairs cannot be obtained expeditiously. (*B. & P.C. 9798.*)

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F. Miscellaneous Statutes.
1. Advertising.

4 Witkin Sum. Cal. Law Sales § 336

[§ 336] Advertising.

Advertising is the subject of extensive regulation. (On false advertising generally, see 13 *Summary* (10th), *Equity*, §109; 2 *Cal. Crim. Law* (3d), *Crimes Against Property*, §212 et seq.; on billboards, see 8 *Summary* (10th), *Constitutional Law*, §1066 et seq.; on advertising of securities, see 9 *Summary* (10th), *Corporations*, §§441, 442.) Some of the areas covered include:

(1) *Consumer Credit*. A seller may not advertise any payment, number of payments, or repayment period for goods, property, or services purchased under an *open-end credit plan* accepted by more than one seller unless the seller clearly and conspicuously discloses: (a) the cash price and amount or percentage of a downpayment; (b) the monthly or periodic payment, number of payments or period of repayment, total amount of all payments, and whether the payment is calculated on the assumption that the purchaser has no outstanding balance due under the plan; (c) the amount of the finance charge and any periodic rate expressed as an annual percentage; (d) any minimum, fixed, transaction, activity, or similar charge and any membership or participation fee; (e) the name of the creditor, if not the seller; and (f) whether the advertised terms are available to the purchaser only after the creditor's approval. (*B. & P.C. 17538.7(a)*; see *B. & P.C. 17538.7(b)* [compliance of catalog or multiple-page advertisement with *B. & P.C. 17538.7(a)*].) The seller must also disclose the cash price proximate to the advertised payment, number of payments, or repayment period. (*B. & P.C. 17538.7(c)*.) Advertising of terms that are not or will not be arranged or offered by the creditor is prohibited. (*B. & P.C. 17538.7(d)*.) (See 17 *Pacific L. J.* 650.)

(2) *E-Mailed Material*. *B. & P.C. 17529* et seq., added in 2003 and replacing former *B. & P.C. 17538.4*, restrict the sending of unsolicited commercial e-mail. (See *Ferguson v. Friendfinders* (2002) 94 *C.A.4th* 1255, 1269, 115 *C.R.2d* 258 [*B. & P.C. 17538.4* does not violate dormant Commerce Clause of United States Constitution]; on restriction of transmission of text message advertisement to cell telephone or pager, see *B. & P.C. 17538.41*.) However, the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (Pub. Law 108-187), effective Jan. 1, 2004, expressly preempts state laws restricting the sending of unsolicited commercial e-mail, except insofar as the state laws deal with the false or deceptive aspects of those communications. (See also *B. & P.C. 22947* et seq. (the Consumer Protection Against Computer Spyware Act), which are intended to protect against the deceptive or surreptitious installation of software onto a consumer's computer.)

(3) *Environmental Safety*. A manufacturer or distributor who represents that a consumer good does not harm, or is

beneficial to, the natural environment by using terms such as "environmental choice," "ecologically friendly," "earth friendly," "environmentally friendly," "ecologically sound," "environmentally sound," "environmentally safe," "ecologically safe," "environmentally lite," "green product," or other like terms, must maintain specified written information and documentation supporting the validity of the representation. (*B. & P.C. 17580.*) *B. & P.C. 17580.5* prohibits making any untruthful, deceptive, or misleading environmental marketing claim. "Environmental marketing claim" includes any claim contained in the "Guides for the Use of Environmental Marketing Claims" published by the Federal Trade Commission. However, it is a defense to any suit or complaint brought under *B. & P.C. 17580.5* that the claims at issue conform to the standards or are consistent with the examples contained in the Federal Trade Commission guides. (See *35 Santa Clara L. Rev. 1351.*)

(4) *Facsimile (Fax) Advertisements.* The sending of unsolicited advertisements to fax machines is prohibited by federal law, and anyone receiving such a fax may, "if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State" an action for injunctive relief and damages. (*47 U.S.C., §227*; see *Kaufman v. ACS Systems (2003) 110 C.A.4th 886, 904, 905, 2 C.R.3d 296* [statute is constitutional, and action may be maintained in California court because California has not prohibited such suits].)

(5) *False and Deceptive Advertising.* The Attorney General or other designated public officer may bring an action for recovery of a civil penalty for violation of statutory prohibitions against false and deceptive advertising. (See *B. & P.C. 17206, 17536*; *13 Summary (10th), Equity, §§106, 109.*) (On penal provisions, see *2 Cal. Crim. Law (3d), Crimes Against Property, §215*; on federal regulation, see *90 Harv. L. Rev. 661.*) In addition, the designated public officers may recover heavier civil penalties for violations of injunctions obtainable by those officers to enforce the same statutory prohibitions. (*B. & P.C. 17535, 17535.5*; see *B. & P.C. 17534.5* [remedies cumulative]; *5 Pacific L. J. 301.*)

(6) *Financial Service Solicitations.* *B. & P.C. 14701* prohibits the use of a lender's name, trade name, logo, or tagline, without the lender's consent, in a written solicitation for financial services directed to a consumer who has obtained a loan from the lender, unless the solicitation clearly and conspicuously states that the solicitor is not sponsored by or affiliated with the lender and that the solicitation is not authorized by the lender. The statute also prohibits use of the name of a lender or a name similar to that of a lender in a solicitation for financial services if that use could cause a reasonable person to be confused or deceived as to the lender's sponsorship of or association with the person using the name, or the lender's approval or endorsement of the person using the name.

(7) *Organic Products.* *Health & Saf.C. 110810* et seq. establish advertising standards, labeling requirements, and pesticide residue requirements for organic products, as well as regulating the certification and sale of such products. (On certification organizations, see *Food & Ag.C. 46014.1* et seq.)

(8) *Price of Consumer Goods or Services Sold in Multiple Units.* Any advertising of consumer goods (other than food) or services that are sold only in multiple units must state the minimum multiple-unit price at least as prominently as it quotes any single-unit price. (*B. & P.C. 17504*; see *7 Pacific L. J. 343*; *15 Pacific L. J. 536.*)

(9) *Price of Motor Vehicle.* A dealer may not: (a) advertise a specific vehicle for sale without identifying the vehicle by its model, model year, and either its license number or that portion of the vehicle identification number that distinguishes the vehicle from all other vehicles of the same make, model, and model year; (b) advertise the total price without including all costs to the purchaser, except taxes, vehicle registration fees, California tire fees, emission testing fees not exceeding \$ 50, actual fees charged for certificates under *Health & Saf.C. 44060* (compliance with emissions standards), finance charges, and any dealer document preparation charge (which may not exceed \$ 45); (c) fail to state, in any newspaper, magazine, or direct mail advertisement, or in a dealer's website, that these extra charges will be added to the advertised total price (this requirement is satisfied by stating: "Plus government fees and taxes, any finance charges, any dealer document preparation charge, and any emission testing charge"); (d) fail to sell the vehicle to any person at the advertised price provided it is not yet sold and the time stated in the advertisement has not elapsed. The requirement of selling at the advertised total price applies even if the purchaser has no knowledge of that price. (*Veh.C. 11713.1*; see *Donovan v. RRL Corp. (2001) 26 C.4th 261, 267, 109 C.R.2d 807, 27 P.3d 702, 1 Summary (10th),*

Contracts, §264 [*Veh.C. 11713.1* justifies reasonable expectation by consumers that advertisement constitutes offer, but does not supplant common law principles regarding rescission; where dealer's ad contained mistaken low price due to typographical and proofreading errors, dealer could rescind contract].)

Dealers must post in their showrooms a list of all advertised vehicles that are subject to the requirements of *Veh.C. 11713.1* if the vehicles have not been sold or leased during the period the advertised price is valid and do not have the advertised price conspicuously displayed on them. (*Veh.C. 11709.3*.) (On criminal offenses involving advertising and representations concerning automobiles, see 2 *Cal. Crim. Law (3d)*, *Crimes Against Property*, §218.)

(10) *Price Requiring Buyer To Apply for Rebate*. It is unlawful to advertise a price that requires a buyer to send in a coupon to a manufacturer for a cash rebate, unless the price actually paid to the seller is clearly and conspicuously advertised, along with the final price with the coupon. (*B. & P.C. 17701.5*.)

(11) *Transportation and Accommodations*. Advertisements offering free or discounted transportation to persons who purchase specified accommodations, or conversely, free or discounted accommodations to persons who purchase specified transportation, must state the total price the consumer would pay for transportation and accommodations. In a written advertisement, the price must appear "in a size and prominence no less than the largest print in the reference." In an oral advertisement, the price must immediately precede or follow the description of the transportation or accommodations. (*B. & P.C. 17538.8*.)

West's Key Number Digest, Consumer Protection k.7, 9-

SUPPLEMENT: [This section is current through the latest supplement]

(2) *E-Mailed Material*. See *B. & P.C. 22948* et seq. [Anti-Phishing Act of 2005, making it unlawful to use Internet or other electronic means to induce another to provide identifying information by representing oneself to be business without approval or authority of business]; *B. & P.C. 22948.5* et seq. [device that includes integrated and enabled wireless access for use in small office, home office, or residential setting must include warning advising how to protect network connection against unauthorized access]; 38 *Loyola L.A. L. Rev.* 2219 [California's spyware statutes]; 32 *Pepperdine L. Rev.* 1021 [assessing potential effectiveness and constitutionality of federal and European schemes for controlling unsolicited commercial e-mail]; 10 *A.L.R.6th* 1 [federal and state statutes regulating unsolicited e-mail].

(4) *Facsimile (Fax) Advertisements*. See *B. & P.C. 17538.43*, added in 2005 (2 *Cal. Crim. Law (3d)*, *Crimes Against Property*, Supp., §217), prohibiting the sending of unsolicited advertising faxes; 30 *A.L.R. Fed* 2d 537 [class actions under 47 U.S.C., §227]. (5) *False and Deceptive Advertising*. See 39 *Loyola L.A. L. Rev.* 277, 291 [use of consumer protection statutes to attack food marketing practices aimed at children].

(9) *Price of Motor Vehicle*. On used vehicle certification programs, see Supp., infra, §396A.



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2. Anabolic Steroids.

4 Witkin Sum. Cal. Law Sales § 337

[§ 337] Anabolic Steroids.

C.C. 1812.97(a) provides that contracts for the lease or rental of athletic facilities (defined in C.C. 1812.97(c)) offering instruction or training in various physical fitness activities and sports must contain the following warning, in 10-point bold type: "Warning: Use of steroids to increase strength or growth can cause serious health problems. Steroids can keep teenagers from growing to their full height; they can also cause heart disease, stroke, and damaged liver function. Men and women using steroids may develop fertility problems, personality changes, and acne. Men can also experience premature balding and development of breast tissue. These health hazards are in addition to the civil and criminal penalties for unauthorized sale, use, or exchange of anabolic steroids."

The above warning must also be conspicuously posted in all athletic facilities in the state having locker rooms. (C.C. 1812.97(b) [requiring at least one warning in every locker room of a facility].)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Automatic Checkout Systems.

4 Witkin Sum. Cal. Law Sales § 338

[§ 338] Automatic Checkout Systems.

B. & P.C. 13300 et seq. govern automatic checkout systems that are used to sell goods or services to consumers. Business establishments that use such systems are required to ensure that "the price of each good or service to be paid by the consumer is conspicuously displayed to the consumer at the time that the price is interpreted by the system." All price reductions, surcharges, taxes, and the total amount for each transaction must be displayed. (*B. & P.C. 13300*.) The Attorney General, the district attorney, or a city attorney may enforce this requirement (*B. & P.C. 13301*), and the imposition of civil penalties, including an appeal process, is authorized (*B. & P.C. 13302*). (On requirement that grocery stores using automatic checkout systems display price on goods offered for sale, see *infra*, §361.)

SUPPLEMENT: [This section is current through the latest supplement]

B. & P.C. 13300 was amended in 2006 to apply to "point-of-sale systems" rather than automatic checkout systems.



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4. Bottled Water.

4 Witkin Sum. Cal. Law Sales § 339

[§ 339] Bottled Water.

Health & Saf.C. 111070 et seq. regulate bottled and vended water. Processors and distributors of bottled water must comply with federal manufacturing regulations, and must subject the water to filtration and germicidal treatment. (*Health & Saf.C. 111075*.) Water quality and labeling standards are established (*Health & Saf.C. 111080*), as are requirements for polycarbonate resins in water containers (*Health & Saf.C. 111085*). Water vending machines must comply with construction and performance standards established by the Department of Health Services. (*Health & Saf.C. 111090*.) All sources of bottled or vended water must be monitored annually for the presence of volatile organic compounds of potential public health concern, as specified by the United States Environmental Protection Agency. (*Health & Saf.C. 111150*.) The Department of Health Services may also require a bottler, vendor, or distributor to test for any substance whenever the department believes that substance may be present in the water source and threaten public health. (*Health & Saf.C. 111155*.)

SUPPLEMENT: [This section is current through the latest supplement]

Health & Saf.C. 111071, added in 2007, requires each bottled water plant to prepare an annual bottled water report, containing specified information, and to make that report available to each customer on request.



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5. Cemetery Contracts.

4 Witkin Sum. Cal. Law Sales § 340

[§ 340] Cemetery Contracts.

Health & Saf.C. 8277, 8278 regulate sales by cemeteries of services, merchandise, and interment plots. The contract of sale must be in writing, state the total price, itemize all charges, and specify the space and location sold. (*Health & Saf.C. 8277.*) The contract must also state in 10-point bold type that the purchaser is entitled to cancel the transaction within 5 days if no substantial service or merchandise has yet been provided. (*Health & Saf.C. 8278.*) (See *14 Am.Jur.2d (2000 ed.), Cemeteries §31.*)

West's Key Number Digest, Cemeteries k.5 et seq.

SUPPLEMENT: [This section is current through the latest supplement]
See C.E.B., Professional Licensing, §16:31 et seq.



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6. Charitable Solicitations.

4 Witkin Sum. Cal. Law Sales § 341

[§ 341] Charitable Solicitations.

(1) *In General.* *B. & P.C. 17510* et seq. provide for disclosures prior to any solicitation or sales solicitation for charitable purposes. The buyer must be informed of the identity of the charitable organization and the percentage of the total gift or purchase price that will actually be utilized for charitable purposes. (*B. & P.C. 17510.3(a)*.) A "charity" includes "any person who, or any nonprofit community organization, fraternal, benevolent, educational, philanthropic, or service organization, or governmental employee organization which, solicits or obtains contributions solicited from the public for charitable purposes or holds any assets for charitable purposes." (*B. & P.C. 17510.2(d)*.) (See *12 Pacific L. J. 871*, criticizing the "extraordinary reach" of the law; on fraudulent charitable solicitations, see *2 Cal. Crim. Law (3d), Crimes Against Property, §196*.)

Under *B. & P.C. 22930*, nonprofit organizations and commercial fundraisers that state the percentage of a donation of personal property that will be available or used for charitable purposes must calculate the percentage in a prescribed manner; the statute also requires nonprofit organizations and commercial fundraisers that accept a donation of a motor vehicle, aircraft, or vessel to provide the donor with a receipt containing specified information within 90 days of the donation.

(2) *Commercial Fundraisers.* Any legal entity that is compensated for soliciting funds for charitable purposes must disclose (a) that the solicitation is being conducted by a commercial fundraiser; and (b) the name of the commercial fundraiser as registered with the Attorney General. (*B. & P.C. 17510.85*; see *24 Pacific L. J. 718*.) A commercial fundraiser may not retain more than 50% of the net proceeds collected as a fee for fundraising services, although certain flat fees collected for developing a marketing campaign are exempt. Violators of this prohibition are subject to civil remedies and penalties. (*B. & P.C. 17510.87*.) (See *People v. Orange County Charitable Services (1999) 73 C.A.4th 1054, 1077, 87 C.R.2d 253* [in light of defendant commercial fundraiser's frequent misstatements, overall pattern and practice of misrepresentation, and failure to comply with statutory registration, accounting, bonding, and disclosure requirements, trial judge properly enjoined defendant from engaging in detailed list of fundraising practices].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* *B. & P.C. 17510.3(a)* was amended in 2005 to delete the requirement that the percentage of the gift or purchase price that will actually be used for charitable purposes be stated.

B. & P.C. 17510.25, added in 2007, establishes procedures for the charitable solicitation of contributions in public roadways from passing motorists by "law enforcement personnel, firefighters, or other persons employed to protect the public safety of a local agency."



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7. Check Cashing Services.

4 Witkin Sum. Cal. Law Sales § 342

[§ 342] Check Cashing Services.

Check cashers must have a permit to conduct business (C.C. 1789.37) and must post a schedule of fees and a list of acceptable identification (C.C. 1789.30). Check cashers include persons or entities who cash checks or other commercial paper for compensation, but do not include banks, savings associations, credit unions, industrial loan companies, and certain retail sellers. (C.C. 1789.31.) C.C. 1789.35 sets forth the maximum fee that may be charged for various kinds of checks, and specifies the criminal and civil penalties that may be imposed in case of a violation. C.C. 1789.38 provides that the protections afforded by C.C. 1789.30 et seq. may not be waived. (On regulation of deferred deposit transactions, see *Fin.C. 23000* et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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8. Cigarette Sales.

4 Witkin Sum. Cal. Law Sales § 343

[§ 343] Cigarette Sales.

Under Rev.C. 30101.7, if the retail sale of cigarettes in California is not a "vendor-assisted, face-to-face sale," it must meet both of the following requirements: (1) the seller must have complied with the Jenkins Act (15 U.S.C., §375 et seq.); and (2) all applicable state sales taxes must have been paid, or the seller must have included on the outside of the shipping container for any cigarettes shipped to a California resident from a source in the United States "an externally visible and easily legible notice located on the same side of the shipping container as the address to which the package is delivered." The notice, which must be given in specified language, indicates that the seller has reported the sale pursuant to federal law and that the recipient is legally responsible for all applicable unpaid state taxes. The statute is not intended to prohibit "any lawful sale of a tobacco product that occurs by means of a vending machine." (Rev.C. 30101.7(h).)

The State Department of Health Services may assess civil penalties against any person, firm, or corporation that sells or otherwise furnishes to a person under the age of 18 years "any tobacco, cigarette, or cigarette papers, or any other instrument or paraphernalia that is designed for the smoking or ingestion of tobacco, products prepared from tobacco, or any controlled substance." (B. & P.C. 22958.)

B. & P.C. 22963 prohibits the distribution or sale of tobacco products through the mails to persons under the age of 18, and establishes procedures to be followed by those engaging in such distribution or sales to ensure that each sale is to a person 18 years of age or older. (On Cigarette and Tobacco Products Licensing Act (B. & P.C. 22970 et seq.), see 2 Cal. Crim. Law (3d), Crimes Against Governmental Authority, Supp., §135.)

SUPPLEMENT: [This section is current through the latest supplement]

Civil penalties for sale to minors: B. & P.C. 22958 was amended in 2007 to substitute "enforcing agency" for the state Department of Health Services as the party that may assess civil penalties. Additionally, in the portion of B. & P.C. 22958 quoted in the text, p. 319, the word "or" was deleted preceding both "cigarette papers" and "any other instrument."

Distribution to minors through mails prohibited: B. & P.C. 22963 was amended in 2007 to specify that it applies to "nonsale distribution" as well as sale and distribution. "Nonsale distribution" means "to give smokeless tobacco or cigarettes to the general public at no cost, or at nominal cost, or to give coupons, coupon offers, gift certificates, gift

cards, or other similar offers, or rebate offers for smokeless tobacco or cigarettes to the general public at no cost or at nominal cost." (*B. & P.C. 22963(e)(1)(C).*)



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9. Cigar Labeling.

4 Witkin Sum. Cal. Law Sales § 344

[§ 344] Cigar Labeling.

Every retail package of cigars packaged for sale after September 1, 2000, must be labeled with warnings similar to those that now appear on cigarette packages. Persons who violate the labeling requirements may be liable for a civil penalty, and enforcement actions may be brought by the Attorney General, any district attorney, and certain city attorneys and city prosecutors. (*Health & Saf.C. 104550 et seq.*; see *Health & Saf.C. 104552* [any conflicting provisions subsequently enacted by federal Government prevail]; *31 McGeorge L. Rev. 242* [recommending federal Government action].)

SUPPLEMENT: [This section is current through the latest supplement]



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10. Contact Lenses.

4 Witkin Sum. Cal. Law Sales § 345

[§ 345] Contact Lenses.

(1) *In General.* *B. & P.C. 2541.2* governs contact lens prescriptions. Among other requirements, the statute provides that (a) except under specified circumstances, the expiration date of a contact lens prescription may not be less than 1 to 2 years from the date of issuance; (b) the patient must be provided with a copy of the prescription; and (c) a prescriber may not condition availability of an eye examination, a contact lens fitting, or the release of a prescription on the patient's agreeing to purchase contact lenses from that prescriber.

It is a deceptive marketing practice for a licensed physician or surgeon, licensed optometrist, or registered dispensing optician to indicate in an advertisement or sales presentation that contact lenses may be obtained without confirmation of a valid prescription. (*B. & P.C. 2543(b).*)

(2) *Out-of-State Sellers.* The retail sale of contact lenses to California patients by out-of-state sellers is regulated under *B. & P.C. 2546* et seq. The sellers must be registered with the Division of Licensing of the Medical Board of California. (*B. & P.C. 2546.1.*) Among other requirements, a registered seller must (1) provide a toll-free telephone service for responding to patient questions and complaints, (2) provide a specified warning along with the contact lenses advising patients to consult with their eye care practitioners if they experience discomfort or other symptoms, and (3) disclose, in any price advertisement, any required membership or enrollment fees and indicate that shipping costs may apply "unless the advertisement specifically and clearly states otherwise." (*B. & P.C. 2546.5.*) Contact lenses may be sold only on receipt of a written prescription, or copy of a written prescription, but if a written prescription or copy is not available to the seller, the seller may confirm the prescription by direct communication with the prescriber or the prescriber's agent. (*B. & P.C. 2546.6.*) It is a deceptive marketing practice for a nonresident contact lens seller to publish an advertisement or sales presentation indicating that contact lenses may be obtained without a valid prescription. (*B. & P.C. 2546.5.*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* *B. & P.C. 2543(b)*, as amended in 2006, additionally provides that it is a deceptive marketing practice for any individual or entity who offers for sale plano contact lenses (defined in *B. & P.C. 2541(c)*) to represent that the lenses may be obtained without an eye examination or confirmation of a valid prescription, or may be dispensed or furnished to a purchaser without compliance with *B. & P.C. 2562*, relating to follow-up evaluations, except as provided by *B. & P.C. 2546* et seq. (text, p. 320).



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11. Continuing Care Contracts.

4 Witkin Sum. Cal. Law Sales § 346

[§ 346] Continuing Care Contracts.

Health & Saf.C. 1770 et seq. regulate "continuing care contracts," which are contracts that include a continuing care promise made in exchange for an entrance fee, payment of periodic charges, or both types of payments. (*Health & Saf.C. 1771(c)(8)*.) A continuing care promise is a promise to provide one or more elements of care to an elderly resident for the duration of the resident's life or for a term in excess of 1 year. (*Health & Saf.C. 1771(c)(10)*.) A continuing care contract includes a "life care contract," defined as a contract that includes a promise to provide or pay for all levels of care, including acute care and physicians' and surgeons' services, to a resident for life. (*Health & Saf.C. 1771(l)*.)

SUPPLEMENT: [This section is current through the latest supplement]



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12. Cordless Telephones.

4 Witkin Sum. Cal. Law Sales § 347

[§ 347] Cordless Telephones.

In an attempt to alleviate disruption of normal telephone services caused by cordless telephones that are unequipped with security-coded circuitry, the 1990 Legislature added *B. & P.C. 22760*. (See Stats. 1990, Chap. 340, §1.) It is unlawful to sell any cordless telephone manufactured after January 1, 1992, that does not provide *increased protection* from unintentional line seizure, dialing, and ringing. (See *B. & P.C. 22760(c)* [specifying measures for providing increased protection].)

SUPPLEMENT: [This section is current through the latest supplement]



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13. Dating Service Contracts.

4 Witkin Sum. Cal. Law Sales § 348

[§ 348] Dating Service Contracts.

C.C. 1694 et seq. regulate contracts with organizations that offer dating, matrimonial, or social referral services. A buyer may cancel a dating service contract until midnight of the third business day after the day the buyer signed the agreement. (C.C. 1694.1.) The contract must be in writing (C.C. 1694.2(a)), and state the buyer's right to cancel, without penalty or obligation, in at least 10-point boldface type near the signature line (C.C. 1694.2(b)). The contract must also state that the buyer may be relieved of the payment obligations in the event of the buyer's death, disability, or relocation more than 50 miles from the dating service office. (C.C. 1694.3.) The payment or financing period may not exceed 2 years from the date of the contract, and the contract term may not be measured by the buyer's life. (C.C. 1694.2(d).) Contracts not complying with C.C. 1694 et seq. are void and unenforceable (C.C. 1694.4(a)), and buyers may recover treble damages and attorneys' fees (C.C. 1694.4(c)). A waiver of C.C. 1694 et seq. by a buyer is also void and unenforceable. (C.C. 1694.4(e).) (See Cal. Civil Practice, 5 Business Litigation, §52:17 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Duffens v. Valenti* (2008) 161 C.A.4th 434, 454, 74 C.R.3d 311 [dating service contract was void under C.C. 1694.4(a) where it failed to include relief of obligations clause required by C.C. 1694.3].



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14. Deceptive Identification Documents.

4 Witkin Sum. Cal. Law Sales § 349

[§ 349] Deceptive Identification Documents.

B. & P.C. 22430 regulates the sale of a deceptive identification document (a nongovernmental document purporting to be a governmental document or capable of deceiving an ordinary reasonable person into believing that it is). (*B. & P.C. 22430(b)*.) The sale of such a document is prohibited unless (1) the words "NOT A GOVERNMENT DOCUMENT," in not less than 14-point type and in permanent ink, are printed diagonally across the face of the document and (2) the manufacturer's name is printed conspicuously on the document. (*B. & P.C. 22430(a)*.) (On criminal penalties, see 2 *Cal. Crim. Law (3d)*, *Crimes Against Property*, §232.)

SUPPLEMENT: [This section is current through the latest supplement]



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15. Dental Services.

4 Witkin Sum. Cal. Law Sales § 350

[§ 350] Dental Services.

C.C. 1689.3 provides that a patient who contracts for services directly with a dental office or plan may *rescind* the contract or plan until midnight of the third business day after signing the contract or plan. The dental office is entitled to compensation for services provided prior to rescission.

SUPPLEMENT: [This section is current through the latest supplement]



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16. Discount Buying Services.

4 Witkin Sum. Cal. Law Sales § 351

[§ 351] Discount Buying Services.

C.C. 1812.101 et seq. regulate the sale of discount buying services to consumers. Under C.C. 1812.101, the statute applies except where:

(1) The fee does not exceed a one-time fee of \$ 50 or an annual fee of \$ 25, or does not exceed a one-time or annual fee of \$ 50 and the organization provides a majority of goods and services at a fixed location.

(2) The fee does not exceed a one-time or annual fee of \$ 100, and the organization meets additional specified requirements, including the establishment of an escrow account of \$ 50,000 for the purpose of providing refunds to members.

(3) The services are furnished by a nonprofit organization as a secondary incident of membership.

(4) For a consideration collected from another entity, a person or organization provides clients of the other entity with the ability to purchase goods or services at discount prices. That person or organization is not a discount buying organization as long as the clients of the other entity do not order from or pay money to that person or organization; "however, the entity, from which the customer purchases the right to obtain goods or services at discount prices, shall comply with the requirements of this title."

Where the statute applies, sellers ("discount buying organizations") must be bonded (C.C. 1812.103 et seq.) and must provide services only under written contracts that include certain provisions and exclude others (C.C. 1812.107 et seq.). Injured buyers may be awarded treble damages, restitution of moneys paid, and reasonable attorneys' fees, or a minimum of \$ 1,000 plus attorneys' fees on proof of misrepresentation by the seller. (C.C. 1812.123; see also C.C. 1812.125 [violation a misdemeanor].)

SUPPLEMENT: [This section is current through the latest supplement]



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17. Drug Prescriptions.

4 Witkin Sum. Cal. Law Sales § 352

[§ 352] Drug Prescriptions.

Every pharmacy is required to post a conspicuous notice concerning the availability of prescription price information, the possibility of generic drug product selection, and the type of services provided by pharmacies. As an alternative to posting, the required information may be included in the written receipts given to customers. Any pharmacist or pharmacy employee must give the current price of any drug upon request. (*B. & P.C. 4122.*)

In filling a prescription, the pharmacist may substitute for the prescribed drug a less costly equivalent product "of the same generic drug name as determined by the United States Adopted Names (USAN) and accepted by the federal Food and Drug Administration (FDA), of those drug products having the same active chemical ingredients." However, the substitution may not be made if the prescriber forbids substitution. The prescriber has no liability for the pharmacist's act or omission in making the substitution, which must be indicated on the prescription label. (*B. & P.C. 4073*; see *24 Pacific L. J. 655.*) (See also *Health & Saf.C. 119400* et seq., requiring pharmaceutical companies to adopt a Comprehensive Compliance Program that limits gifts or incentives provided to medical and health professionals.)

SUPPLEMENT: [This section is current through the latest supplement]

B. & P.C. 4122 was amended in 2006 to additionally require the posted notice to include a statement of patients' rights relating to the requirements imposed by *B. & P.C. 733* (pharmacist's duty to dispense prescribed or ordered drugs and devices).



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18. Electronic Commerce.

4 Witkin Sum. Cal. Law Sales § 353

[§ 353] Electronic Commerce.

(1) *In General.* Commerce carried on by electronic means has grown rapidly in recent years, giving rise to numerous legal issues that have not been dealt with in any comprehensive manner by statute. Relevant existing law includes: the Electronic Commerce Act, *infra*, this section; the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (Pub. Law 108-187, *supra*, §336); the Uniform Electronic Transactions Act (C.C. 1633.1 et seq.; 1 *Summary* (10th), *Contracts*, §11 et seq.); and 47 U.S.C., §151 note (moratorium on state tax on electronic commerce). (See also *Gentry v. eBay* (2002) 99 C.A.4th 816, 827, 121 C.R.2d 703 [Internet auction provider's liability to purchasers of forged autographed sports items]; 54 *Hastings L. J.* 847 [arguing in favor of binding legal rules for Internet privacy in order to encourage electronic commerce]; 106 A.L.R.5th 309 [enforceability of "shrinkwrap" or "clickwrap" agreements used in Internet transactions]; on electronic contacts as a basis for personal jurisdiction, see 2 *Cal. Proc.* (4th), *Jurisdiction*, Supp., §164A; on copyright issues relating to the Internet, see 13 *Summary* (10th), *Personal Property*, §§64, 66.)

(2) *Electronic Commerce Act.* The Electronic Commerce Act of 1984 (C.C. 1789 et seq.) requires a provider of an electronic commercial service to furnish consumers, at the time it contracts with them and annually thereafter, the following information: the name, address, and telephone number of the service provider; any charges for use of the service; and consumer complaint resolution procedures. (C.C. 1789.3.) An "electronic commercial service" means "an electronic shopping system to conduct the purchase of goods and services via a telecommunications network, but does not mean conventional voice-only telephone service, one-way television or radio broadcasting, an electronic fund transfer system, or a service provided through an electronic terminal located at a place of business where the sale of goods or services sold through that service otherwise occurs." (C.C. 1789.2(a).) A knowing and wilful violation of the Act is subject to a civil penalty not to exceed \$ 5,000. (C.C. 1789.5.) The protections afforded by the Act may not be waived. (C.C. 1789.9.)

The Act does not apply (a) where it is inconsistent with, or infringes upon, federal law; (b) to the rights and obligations of a cardholder and a card issuer with respect to use of a credit card arising from the purchase of goods or services conducted through an electronic commercial service; or (c) to the rights and obligations of a consumer and a financial institution with respect to an electronic fund transfer arising from purchase of goods or services conducted through an electronic commercial service. (C.C. 1789.7.)

SUPPLEMENT: [This section is current through the latest supplement]
(1) *In General.*

Basis for jurisdiction:

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §159.



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19. Factory-Built Housing.

4 Witkin Sum. Cal. Law Sales § 354

[§ 354] Factory-Built Housing.

The California Factory-Built Housing Law (*Health & Saf.C. 19960 et seq.*) establishes a statewide building code for homes and the major components of homes. The legislative intent is to deal with problems arising from "the mass production of housing, consisting primarily of factory manufacture of dwelling units or habitable rooms thereof," by establishing uniform health and safety standards and inspection procedures, thereby encouraging the reduction of housing construction costs and making housing and home ownership more feasible for all residents of the state. (*Health & Saf.C. 19961.*) (See *23 Stanf. L. Rev. 978*; on sale of used mobilehomes, see *infra*, §396.)

SUPPLEMENT: [This section is current through the latest supplement]



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20. Fine Prints.

4 *Witkin Sum. Cal. Law Sales* § 355

[§ 355] Fine Prints.

C.C. 1740 et seq. require full disclosure in the sale of "fine art multiples" that are offered for sale or sold at wholesale or retail for \$ 100 or more, exclusive of the frame. (C.C. 1741.) A fine art multiple is any fine print, photograph, sculpture cast, collage, or similar object produced in more than one copy, including pages from books and magazines offered as art objects but excluding books and magazines themselves. (C.C. 1740(a).) The statutes require the disclosure of specified "informational details" (C.C. 1744), to be supplied to the purchaser or consignee at his or her request, "or in any event prior to a sale or consignment," in a certificate of authenticity (C.C. 1742). The dealer's disclosure of the information required by C.C. 1744 is generally considered an express warranty as to that information (C.C. 1744.7), but the dealer may disclaim knowledge as to any specific information (C.C. 1742(d)). C.C. 1745 provides for remedies in the form of the return of consideration and, in the case of wilful violations, treble damages. (See 25 *Stanf. L. Rev.* 586 [analyzing the statutes and proposing revisions].)

West's Key Number Digest, Sales k.1.5

SUPPLEMENT: [This section is current through the latest supplement]



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20A. (New) Food Labeling and Disclosures.

4 Witkin Sum. Cal. Law Sales § 355A

[§ 355A] (New) Food Labeling and Disclosures.

(1) *Food Allergen Labeling*. A food is misbranded if its labeling does not conform to the federal food allergen labeling requirements set forth in 21 U.S.C., §343(w) and implementing regulations. This labeling requirement, however, does not apply to food exempted under federal law. (*Health & Saf.C. 110673*, added in 2008.)

(2) *Nutritional and Calorie Information*. *Health & Saf.C. 114094* was added in 2008 to require food facilities (restaurants and other food service establishments as defined in *Health & Saf.C. 114094(a)*) to disclose, as specified, calorie content information or nutritional information about the food they sell. The definition of food facility excludes establishments that are part of a chain of fewer than 20 like establishments within the state, as well as numerous specified kinds of facilities, including farmers markets, school cafeterias, and vending machines. (*Health & Saf.C. 114094(a)(1)*.) Local regulations of this type are displaced (*Health & Saf.C. 114094(j)*), and a violation of this section is an infraction, not a misdemeanor (*Health & Saf.C. 114094(k)*).

SUPPLEMENT: [This section is current through the latest supplement]



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21. Food or Drug Ordered Removed From Sale.

4 Witkin Sum. Cal. Law Sales § 356

[§ 356] Food or Drug Ordered Removed From Sale.

Health & Saf.C. 100230 prohibits selling or offering for sale any food, drug, device or cosmetic following written notice from a manufacturer, wholesaler, distributor, importer, the state Department of Health Services, or local health officer that the product is linked to an outbreak of illness, injury, or product tampering and is being ordered removed from sale under *Health & Saf.C. 100180*. A violation is subject to a fine of at least \$ 2,000, but not more than \$ 10,000 for each day the violation continues, or by imprisonment in county jail for not more than 1 year, or by both fine and imprisonment. (*Health & Saf.C. 100230(a)*.) The minimum and maximum fines become \$ 5,000 and \$ 25,000, respectively, and imprisonment is in the state prison if a second or subsequent violation occurs after a previous final conviction. (*Health & Saf.C. 100230(b)*); see *Health & Saf.C. 100230(c)* [minimum fines may be suspended where court finds mitigating circumstances].) The court may order a person violating *Health & Saf.C. 100230* to pay, as a condition of probation and in lieu of a fine, the expenses incurred by a local health department or the State Department of Health Services in monitoring compliance with the removal order. (*Health & Saf.C. 100235* [total costs collectively imposed must not exceed maximum fine].)

SUPPLEMENT: [This section is current through the latest supplement]

Health & Saf.C. 100180, 100230, and 100235 were repealed and replaced by *Health & Saf.C. 131080, 131130, and 131135*, respectively, in 2006 without substantive change.



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22. Franchise Investments.

4 Witkin Sum. Cal. Law Sales § 357

[§ 357] Franchise Investments.

The Franchise Investment Law (*Corp.C. 31000* et seq.) regulates the advertising and sale of franchises. The statute was designed to protect prospective franchisees against fraud and unfulfilled promises (*Corp.C. 31001*), and it requires that specified disclosures be made in connection with the sale of a franchise (*Corp.C. 31119*). (See 9 *Summary* (10th), *Corporations*, §456 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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23. Funeral Services.

4 Witkin Sum. Cal. Law Sales § 358

[§ 358] Funeral Services.

Funeral directors must furnish, on beginning a discussion of prices or of the funeral goods and services offered, a written or printed list containing the prices for professional services offered. The list must also contain a statement giving the price range of caskets offered for sale, and a statement indicating that the deceased's survivor who is handling funeral arrangements, "or the responsible party," is entitled to receive a copy of any preneed agreement that was signed and paid for by the deceased and that is in the funeral establishment's possession. (*B. & P.C. 7685.*)

B. & P.C. 7685.5 and *9663* additionally require the Cemetery and Funeral Bureau to make available to funeral establishments and cemetery authorities a consumer guide for funeral and cemetery purchases, which each establishment or authority must display and make available to any person who inquires, in person, about a funeral or cemetery purchase. Prior to the drafting of a contract, the consumer must be provided with a copy of the guide "for retention." *B. & P.C. 17530.7* prohibits any person, other than a funeral director, from selling a casket or other burial container without complying with certain price and disclosure requirements.

SUPPLEMENT: [This section is current through the latest supplement]
See C.E.B., Professional Licensing, §16:31 et seq.



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24. Gasoline Price Posting.

4 *Witkin Sum. Cal. Law Sales* § 359

[§ 359] Gasoline Price Posting.

B. & P.C. 13531(a) requires persons selling gasoline or other motor vehicle fuel (fuel does not include propane) to display on the premises a sign showing the price of the three major grades of gasoline or motor vehicle fuel sold. The sign must be clearly visible from the road adjacent to the premises. Where the business is situated at an intersection of streets, the sign must be clearly visible from both streets. A city or county may, by ordinance, exempt areas designated as scenic corridors or historic preservation areas from these requirements. (*B. & P.C. 13531(b).*)

B. & P.C. 13532 permits advertisement of a discount or reduced price provided that certain conditions are met; and, if there is conformity with general statutory requirements for signs (imposed by *B. & P.C. 13530* et seq.), it permits additional signs or advertising stating the discount or price of one or more types of motor vehicle fuel sold on the premises.

SUPPLEMENT: [This section is current through the latest supplement]



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25. Gift Certificates.

4 *Witkin Sum. Cal. Law Sales* § 360

[§ 360] Gift Certificates.

C.C. 1749.5 makes it unlawful to sell a gift certificate with an expiration date. (On definition of gift certificate, see C.C. 1749.45.) Any gift certificate sold after January 1, 1997, may be redeemed for cash or replaced with a new gift certificate at no cost to the purchaser or holder, and a gift certificate sold without an expiration date is valid until redeemed or replaced. The statute is inapplicable, however, 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 certificate: (1) a gift certificate distributed to a consumer in connection with an awards, loyalty, or promotional program without any money or other thing of value being given in exchange by the consumer; (2) gift certificates sold below face value at a volume discount to employers or to nonprofit and charitable organizations for fundraising purposes, if the expiration date is no more than 30 days after the date of sale; and (3) gift certificates issued for a food product.

Under C.C. 1749.51, the protections of C.C. 1749.5 may not be waived. (See also C.C. 1749.6 [issuer who is in bankruptcy must continue to honor certificates issued prior to bankruptcy filing].)

In *Freeman v. Wal-Mart Stores* (2003) 111 C.A.4th 660, 666, 3 C.R.3d 860, the court assumed that a store's shopping card was a gift certificate and thus subject to the prohibitions of C.C. 1749.5. However, because the card did not have an expiration date, the court held that it did not violate the statute, even though, if it was not used within 2 years, a monthly fee of \$ 1 was deducted from its value until the card was used or no longer had any value. The Legislature addressed this issue in 2003. Under amendments enacted that year, a gift certificate may not be made subject to a service fee, including a fee for dormancy, unless all the following criteria are met:

- (1) The value remaining on the certificate is \$ 5 or less each time the fee is assessed.
- (2) The fee is \$ 1 or less per month.
- (3) There has been no activity on the certificate for 24 consecutive months, "including, but not limited to, purchases, the adding of value, or balance inquiries."
- (4) The certificate holder may reload or add value to the certificate.
- (5) The terms of the service fee are printed on the certificate in at least 10-point font.

The 2003 amendments to C.C. 1749.5 apply only to gift certificates issued on or after January 1, 2004. (C.C. 1749.5(g).)

SUPPLEMENT: [This section is current through the latest supplement]

C.C. 1749.5 was amended in 2007 to specify that a gift certificate with a cash value of less than \$ 10 is redeemable in cash for its cash value.



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26. Groceries Commodities Pricing.

4 Witkin Sum. Cal. Law Sales § 361

[§ 361] Groceries Commodities Pricing.

A retail grocery store or grocery department within a general retail merchandise store, which uses an automatic checkout system, must have a clearly readable price indicated on 85% of the total number of nonexempt consumer commodities offered for sale. (C.C. 7100(a); see C.C. 7100(b), specifying exempt commodities.) An "automatic checkout system" is defined as "a computer capable of interpreting the universal product code or any other code which is on an item offered for sale to determine the price of items being purchased." (C.C. 7100(c)(1).) Intentional violations of C.C. 7100 are subject to civil penalties, and any person may bring an action to enjoin a violation. (C.C. 7101.)

SUPPLEMENT: [This section is current through the latest supplement]

C.C. 7100 was amended in 2006 to substitute "point-of-sale system" for "automatic checkout system." A point-of-sale system is "any computer or electronic system used by a retail establishment such as, but not limited to, Universal Product Code scanners, price lookup codes, or an electronic price lookup system as a means for determining the price of the item being purchased by a consumer." (C.C. 7100(c)(1).)



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27. Health and Dance Services Contracts.

4 Witkin Sum. Cal. Law Sales § 362

[§ 362] Health and Dance Services Contracts.

C.C. 1812.50 et seq. regulate contracts for dance studio lessons and related services, and C.C. 1812.80 et seq. regulate contracts for health studio services. The two statutes are substantially the same. The areas covered include: formal requisites of contracts (C.C. 1812.52, 1812.82, 1812.85); duration of contracts (C.C. 1812.53, 1812.83, 1812.84); performance or cancellation (C.C. 1812.54, 1812.85); payments and financing (C.C. 1812.53 et seq., 1812.84, 1812.87); refunds in the case of death or disability (C.C. 1812.57, 1812.89); the effect of violations (C.C. 1812.59 et seq., 1812.91 et seq.); and, in the case of dance studios, the filing of a bond (C.C. 1812.64). (See *People v. Arthur Murray* (1965) 238 C.A.2d 333, 344, 47 C.R. 700 [constitutionality of dance studio statute]; *Porter v. Arthur Murray* (1967) 249 C.A.2d 410, 424, 57 C.R. 554 [plaintiff customer signed multiple contracts providing for dance lesson hours that would have taken 10 years to receive, with total payments of over \$ 30,000; contracts were illegal, and plaintiff was entitled to recover amount paid]; *Holland v. Nelson* (1970) 5 C.A.3d 308, 313, 85 C.R. 117 [large size of contract supported inference of wilful violation]; 28 A.L.R.3d 1412 [seller's liability for fraud in long-term dance contracts].)

SUPPLEMENT: [This section is current through the latest supplement]



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28. Home Protection Contracts.

4 Witkin Sum. Cal. Law Sales § 363

[§ 363] Home Protection Contracts.

Ins.C. 12740 et seq. regulate "home protection contracts." These are contracts under which, for a fee, a person undertakes for a specified period of time to repair or replace all or any part of the home or its appliances. (*Ins.C. 12740(a)*.) Persons issuing such contracts are required to be licensed (*Ins.C. 12744*), and home protection companies must maintain a minimum net worth, the amount of which depends on the number of contracts issued in the preceding calendar year (*Ins.C. 12750*). *Ins.C. 12762* specifies the information that must be included in such contracts.

SUPPLEMENT: [This section is current through the latest supplement]



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29. Insurance Sales by Banks.

4 Witkin Sum. Cal. Law Sales § 364

[§ 364] Insurance Sales by Banks.

Ins.C. 759 et seq. establish consumer protections in connection with retail sales practices, solicitations, advertising, and offers of insurance products or annuities by banks and savings associations. These protections include the prohibition of specified misleading practices (*Ins.C. 761*), required disclosures both in advertisements and promotional materials and at the time of the consumer's initial purchase of an insurance product or annuity (*Ins.C. 762*), and the physical segregation, "to the extent practicable," of the areas where insurance business is transacted from the areas where the bank's or savings association's regular banking business takes place. (*Ins.C. 763*.) Only persons who are appropriately qualified and licensed under the Insurance Code may conduct insurance business in any part of, or on behalf of, the bank or savings association. (*Ins.C. 764*.)

SUPPLEMENT: [This section is current through the latest supplement]



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30. Invention Development Services Contracts.

4 Witkin Sum. Cal. Law Sales § 365

[§ 365] Invention Development Services Contracts.

B. & P.C. 22370 et seq. govern the development and promotion of inventions by an "invention developer." The legislative intent is "to foster and encourage competition, fair dealing, and prosperity in the field of invention development services by prohibiting or restricting false and misleading advertising, onerous contract terms, harmful financial practices, and other ... practices by which the public has been injured." There are provisions regulating the contract (*B. & P.C. 22372* et seq.) and the rights of the developer and the developer's assignees (*B. & P.C. 22375* et seq.). *B. & P.C. 22381* requires that specified disclosures be made and given to the customer ("inventor") in writing. Remedies and enforcement mechanisms are provided. (*B. & P.C. 22382* et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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31. Life Insurance Policy Illustrations.

4 Witkin Sum. Cal. Law Sales § 366

[§ 366] Life Insurance Policy Illustrations.

Ins.C. 10509.950 et seq. regulate the use of life insurance policy illustrations by sellers of group and individual life insurance policies and certificates. Each illustration must contain specified information and conform to specified format requirements. (*Ins.C. 10509.955, 10509.956.*) Each holder of a policy designated as one for which illustrations will be used is entitled to an annual report on the status of the policy. (*Ins.C. 10509.959.*) Persons violating the statute's requirements are subject to the Insurance Commissioner's powers to investigate, report on, and obtain injunctive relief against unfair and deceptive practices under *Ins.C. 790.06*. (*Ins.C. 10509.961.*)

SUPPLEMENT: [This section is current through the latest supplement]



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32. Long-Term Care Insurance.

4 *Witkin Sum. Cal. Law Sales* § 367

[§ 367] Long-Term Care Insurance.

The Robbins-Roos-La Follette Long-Term Care Insurance Act of 1989 (*Ins.C. 10231 et seq.*) regulates long-term care insurance contracts. "Long-term care insurance" is defined as any insurance policy, certificate, or rider "designed to provide coverage for diagnostic, preventive, therapeutic, rehabilitative, maintenance, or personal care services that are provided in a setting other than an acute care unit of a hospital." (*Ins.C. 10231.2.*) Among the consumer protections provided by the Act are (1) imposition upon insurers of a duty of honesty, good faith, and fair dealing in their relations with policyholders and prospective policyholders (*Ins.C. 10234.8*); and (2) prohibitions against genetic testing for purposes of underwriting or determining insurability (*Ins.C. 10233.1*), and against unnecessary replacement of long-term care insurance policies (*Ins.C. 10234.85*).

Long-term care insurance policies delivered or issued for delivery on or after January 1, 1991, must offer an option to purchase an inflation protection feature. (*Ins.C. 10237 et seq.*)

SUPPLEMENT: [This section is current through the latest supplement]



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33. Mail Order and Internet Sales.

4 Witkin Sum. Cal. Law Sales § 368

[§ 368] Mail Order and Internet Sales.

(1) *In General.* *B. & P.C. 17538* et seq. regulate sales of consumer goods and services conducted through the mails, over the Internet, and by other electronic means. The seller must make one of certain specified responses within 30 days to most kinds of prepaid orders. (*B. & P.C. 17538, 17538.3.*) A seller conducting *any* business (mail order or otherwise) that uses a post office box address, or a street address representing a site used for receipt or delivery of mail or as a telephone answering service, must disclose in all advertising and order forms the business' legal name and complete street address from which business is actually conducted. (*B. & P.C. 17538.5.*) (See *15 Pacific L. J. 537*; *17 Pacific L. J. 649*; on restrictions on advertising by electronic means, see *supra*, §336.)

(2) *Home Business Operators.* The requirement of disclosing the business' legal name and street address is subject to some exceptions, most notably one for persons who conduct business from their residences and who use a private mail receiving service. Such home business operators must file a specified form with the United States Postal Service and complete a form, supplied by the mail receiving service, authorizing the service to act as the home business operator's agent for service of process. (*B. & P.C. 17538.5.*)

SUPPLEMENT: [This section is current through the latest supplement]



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34. Manufacturer's Identification Mark.

4 Witkin Sum. Cal. Law Sales § 369

[§ 369] Manufacturer's Identification Mark.

Any person who, with the intent to defraud, sells or disposes of specified kinds of manufactured items from which the manufacturer's serial number, nameplate, or other identification mark *has been removed or altered* is liable to the purchaser for treble the actual damages sustained and to the manufacturer in the sum of \$ 500 for each transaction. Included are such items as a radio, piano, firearm, sewing machine, vacuum cleaner, typewriter, bicycle, and watch. (C.C. 1710.1 [violations do not include changes made in ordinary course of business by manufacturer or its representative].)

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35. Medi-Cal and Asset Liquidation Disclosures.

4 Witkin Sum. Cal. Law Sales § 370

[§ 370] Medi-Cal and Asset Liquidation Disclosures.

Ins.C. 789.8 imposes certain duties on life agents in the sale of products to "elders" (defined in *Ins.C. 789.8(a)* as persons residing in California who are 65 years of age or older). A life agent who offers to sell an elder any life insurance or annuity product must advise the elder (or the elder's agent) in writing that the sale or liquidation of any stock, bond, IRA, certificate of deposit, mutual fund, annuity, or other asset to fund the purchase may have tax or other financial consequences, and that the elder may wish to consult an independent legal or financial advisor. (*Ins.C. 789.8(b)*.) A life agent who offers an elder a financial product on the basis of its treatment under the Medi-Cal program may not negligently misrepresent the treatment of any asset under the Medi-Cal statutes, rules, and regulations "as it pertains to the determination of the elder's eligibility for any program of public assistance" (*Ins.C. 789.8(c)*); the agent must also provide the elder, in writing, with a series of specified disclosures concerning the Medi-Cal program's resource and income requirements (*Ins.C. 789.8(d)*). (See also *Ins.C. 789.9*, prohibiting sale of individual annuity to senior under specified circumstances where purpose of purchase is to affect Medi-Cal eligibility.)

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36. Membership Camping Contracts.

4 Witkin Sum. Cal. Law Sales § 371

[§ 371] Membership Camping Contracts.

C.C. 1812.300 et seq. regulate contracts for membership camping. "Membership camping operator" is defined as an enterprise concerned with "the ownership or operation of campgrounds which include or may include use of camping sites, that solicits membership paid for by a fee or periodic payments, such as annual dues, and the contractual members are the primary intended users." (C.C. 1812.300(a).) "Membership camping contract" is defined as an agreement for a membership providing a right to use a membership camping operator's campgrounds more than 14 days a year. (C.C. 1812.300(b).) The provisions of the statute, which may not be waived (C.C. 1812.316), cover the formal requisites of contracts (C.C. 1812.303); cancellation rights (C.C. 1812.303, 1812.304); disclosures to purchasers (C.C. 1812.302); withdrawal of campgrounds from use (C.C. 1812.307); the transfer of interests in campgrounds (C.C. 1812.308); membership camping brokers (C.C. 1812.314); and remedies for violations (C.C. 1812.306). C.C. 1812.301 specifies that membership camping contracts are subject to the Unruh Act (C.C. 1801 et seq.; see *supra*, §263 et seq.) and the unfair competition and false advertising laws (*B. & P.C. 17200 et seq., 17500 et seq.*; see 13 *Summary* (10th), *Equity*, §105 et seq.).

West's Key Number Digest, Sales k.1.5

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37. Money Exchange Houses.

4 Witkin Sum. Cal. Law Sales § 372

[§ 372] Money Exchange Houses.

B. & P.C. 22515 et seq. regulate "money exchange houses," defined as any individual or business engaged in exchanging or dealing in the currency of any country. (*B. & P.C. 22515(a)* [excluding chartered banks, savings associations, or credit unions, and any other business regulated by the Financial Code].) Window or exterior signs concerning the rate of exchange, and any interior sign or advertising quoting rates, must clearly state the rate of exchange for both buying and selling dollars. Interior signs and advertising must also state all commissions and fees. (*B. & P.C. 22516* [interior signs must be in English and posted in clear view of customers at each point of exchange].) Customers must be furnished with a detailed receipt for each exchange. (*B. & P.C. 22518.*) Violations of *B. & P.C. 22515* et seq. are punishable by a fine of at least \$ 100 for a first offense, and at least \$ 500 for each subsequent offense. (*B. & P.C. 22519.*)

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38. Motor Vehicle Damage and Safety Defects.

4 Witkin Sum. Cal. Law Sales § 373

[§ 373] Motor Vehicle Damage and Safety Defects.

(1) *Damage Standards.* Veh.C. 34700 et seq. set standards for motor vehicle damage control. No passenger vehicle (see Veh.C. 34710), except one certified by its manufacturer as having been manufactured prior to September 1, 1973, can be sold or registered after September 1, 1973, unless it has a manufacturer's warranty that it has an energy-absorption system that meets the requirements set by the National Highway Traffic Safety Administration. (Veh.C. 34715.)

(2) *Disclosures.* A dealer must disclose in writing to a purchaser of a new or previously unregistered motor vehicle the following information: (a) any *material damage* known by the dealer to have been sustained by the vehicle and subsequently repaired; and (b) any damage, including but *not limited to material damage*, known by the dealer to have been sustained by the vehicle and *not repaired*. Disclosure must occur prior to entering into the contract, or if the damage is unknown at that time, prior to delivery of the vehicle. (Veh.C. 9991, 9992; see Veh.C. 9990 [defining material damage]; on disclosures under lemon law, see *supra*, §319.)

(3) *Safety Defects.* A manufacturer of a motor vehicle who has notified the registered owner of a safety defect in the vehicle must make the necessary correction without charge to the owner or, at the manufacturer's election, reimburse the owner. The manufacturer is relieved of liability for the cost if the owner does not seek the correction within 45 days after receipt of the notice, or within the vehicle warranty period, whichever is longer. (Veh.C. 9975.)

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39. Pet Sales.

4 Witkin Sum. Cal. Law Sales § 374

[§ 374] Pet Sales.

(1) *In General.* *Health & Saf.C. 122045* et seq. (the Polanco-Lockyer Pet Breeder Warranty Act) regulate the sale of dogs by *breeders* (defined in *Health & Saf.C. 122045(b)*). *Health & Saf.C. 122125* et seq. (the Lockyer-Polanco-Farr Pet Protection Act) regulate *pet dealers* of dogs and cats, although many of the provisions apply only to the care and sale of dogs. A pet dealer is defined as a person who is in the business of selling dogs and/or cats at retail, and who must possess a permit under Rev.C. 6066. (*Health & Saf.C. 122125(b)* [excluding breeders]; on regulation of bird sales, see *Health & Saf.C. 122320* et seq.)

(2) *Disclosures and Records.* A breeder must disclose to each purchaser of a dog, and a pet dealer must disclose to each purchaser of a dog or cat, specified information about the animal's breeding and physical condition (*Health & Saf.C. 122050*; *Health & Saf.C. 122140*); must maintain records on the health, status, and disposition of each animal for at least 1 year after disposition (*Health & Saf.C. 122055*; *Health & Saf.C. 122145*); and must provide a purchaser with a written notice of the purchaser's rights (*Health & Saf.C. 122100* [specifying contents of notice]; *Health & Saf.C. 122190* [same]).

At the time of sale of a dog or cat, each pet dealer must provide the purchaser with written information on the benefits of spaying and neutering, and on related subjects. (*Health & Saf.C. 122137*.)

(3) *Purchasers' Remedies.* Breeders and pet dealers must maintain sanitary facilities, and provide adequate space, nutrition, and veterinary care for their dogs. (*Health & Saf.C. 122065*; *Health & Saf.C. 122155*.) If a breeder or pet dealer sells a dog that is diseased or has a congenital or hereditary condition which adversely affects the dog's health, the purchaser may elect to return the dog for a refund, exchange the dog for one of equivalent value, or keep the dog, and may receive reimbursement for reasonable veterinary fees. (*Health & Saf.C. 122070*; *Health & Saf.C. 122160*; see *Health & Saf.C. 122080* [requirements for purchaser to obtain remedies under *Health & Saf.C. 122070*]; *Health & Saf.C. 122170* [requirements for purchaser to obtain remedies under *Health & Saf.C. 122160*].)

(4) *Violations.* Violators of *Health & Saf.C. 122045* et seq. and *Health & Saf.C. 122125* et seq. are subject to a civil penalty not to exceed \$ 1,000. (*Health & Saf.C. 122110*; *Health & Saf.C. 122150*.) A breeder or pet dealer who knowingly sells a dog that is diseased or ill or has a condition, any one of which requires hospitalization or surgery, is subject to civil penalties ranging from as much as \$ 1,000 for a first offense, to as much as \$ 10,000 for a fourth or

subsequent offense. In addition, an offending breeder or pet dealer may be prohibited from selling dogs for periods ranging from less than 30 days to as long as 1 year, depending on the number of offenses. (*Health & Saf.C. 122060; Health & Saf.C. 122205.*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* *Health & Saf.C. 122350* et seq. (the Pet Store Animal Care Act), added in 2007, establish standards for the care and maintenance of animals in the custody of a pet store. The Act applies to all animals, both vertebrate and invertebrate, that are offered for sale by a pet store. (*Health & Saf.C. 122350(b).*) Violations may be punished as infractions or misdemeanors (see *Health & Saf.C. 122357, 122358*), and the Act is not to be construed to limit the application or enforcement of any other laws that protect animals or consumers. (*Health & Saf.C. 122360.*)



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40. Political Items Sold as Originals.

4 Witkin Sum. Cal. Law Sales § 375

[§ 375] Political Items Sold as Originals.

C.C. 1739 et seq. prohibit the sale of a "political item" (button, ribbon, poster, sticker, literature, or advertising) as an "original" (produced during an electoral campaign) when it is not. (C.C. 1739, 1739.1, 1739.2.) If an item is labeled "copy" or "reproduction" at the time of sale, advertising for sale, or offering for sale, there is no violation. (C.C. 1739.3.) The buyer may recover the consideration paid plus interest and, if the violation is knowing, three times the consideration. (C.C. 1739.4.)

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41. Postdated Checks.

4 Witkin Sum. Cal. Law Sales § 376

[§ 376] Postdated Checks.

B. & P.C. 17538.6 prohibits persons conducting business in the state from requesting or requiring a consumer to issue a postdated check unless: (1) the person accepting the check notifies the consumer in writing that the check may be cashed immediately, notwithstanding the postdating, unless the consumer files a postdating order with his or her bank under U.C.C. 4401 (see 4 *Summary* (10th), *Negotiable Instruments*, §120); and (2) the consumer either acknowledges, in writing, receipt of the notice, or the notice is printed clearly on an invoice for goods or services that is provided to the consumer when the check is solicited. (*B. & P.C. 17538.6(a)*.)

B. & P.C. 17538.6 does not apply to any person who requests or requires a consumer to issue a postdated check if the recipient of the check does not submit the check for collection until on or after its date. (*B. & P.C. 17538.6(b)*.)

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42. Precomputed Finance Charges in Residential Sale.

4 Witkin Sum. Cal. Law Sales § 377

[§ 377] Precomputed Finance Charges in Residential Sale.

Precomputed finance charges are prohibited in contracts entered into on or after January 1, 1983, for the construction, sale, or both, of an "entire residence," with or without a parcel of real property or an interest therein, or for the sale of a lot or parcel of real property, including site preparation, with natural persons contracting "primarily for personal, family, or household purposes," when the installment payments are for more than 62 months. (C.C. 1799.8(b), (c), (e); for the definition of "precomputed finance charge," see C.C. 1799.8(a).) The seller may, however, "conclusively rely" on the purchaser's written statement of intended purpose. (C.C. 1799.8(d).) The protections afforded by C.C. 1799.8 may not be waived. (C.C. 1799.85.) (See *11 Pacific L. J.* 396.)

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43. Precomputed Interest in Personal Loan.

4 Witkin Sum. Cal. Law Sales § 378

[§ 378] Precomputed Interest in Personal Loan.

Precomputed interest is prohibited in loans made on or after January 1, 1983, to natural persons "primarily for personal, family, or household purposes" when the installment payments are for more than 62 months. (C.C. 1799.5(b), (e); for the definition of "precomputed interest," see C.C. 1799.5(a).) Lenders may, however, "conclusively rely" on the borrower's written statement of the purpose of the loan. (C.C. 1799.5(c).) And the term "loan" does not include either the forbearance of a debt arising from a sale or lease of property or a loan arising under an open end credit plan. (C.C. 1799.5(d).) The protections afforded by C.C. 1799.5 may not be waived. (C.C. 1799.6.) (See *11 Pacific L. J.* 396.)

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44. Prepaid Calling Cards and Services.

4 Witkin Sum. Cal. Law Sales § 379

[§ 379] Prepaid Calling Cards and Services.

B. & P.C. 17538.9 imposes disclosure and service standards on the advertising and sale of prepaid calling cards and prepaid calling services, including the requirement of a refund if the card or services fail to operate in a commercially reasonable manner. "Prepaid calling services" refers to "any prepaid telecommunications service that allows consumers to originate calls through an access number and authorization code, whether manually or electronically dialed." (*B. & P.C. 17538.9(a)(2)*.) "Prepaid calling card" means "any object containing an access number and authorization code that enables a consumer to use prepaid calling services." (*B. & P.C. 17538.9(a)(3)*.)

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Pub.Util.C. 887, added in 2008, authorizes the Public Utilities Commission to enforce the standards and requirements of *B. & P.C. 17538.9*.



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44A. (New) Recalled Products.

4 Witkin Sum. Cal. Law Sales § 379A

[§ 379A] (New) Recalled Products.

The Product Recall Safety and Protection Act (*Health & Saf.C. 108040* et seq.), added in 2008, prohibits dealers, manufacturers, importers, distributors, wholesalers, or retailers from manufacturing, remanufacturing, distributing, selling, leasing, subletting, "or otherwise plac[ing] into the stream of commerce," any product that is unsafe. (*Health & Saf.C. 108044(a)*.) An unsafe product is one that has been recalled as described in *Health & Saf.C. 108044(b)*. *Health & Saf.C. 108046(a)* specifies steps that must be taken by the persons identified in *Health & Saf.C. 108044* who have placed products into the stream of commerce that are subsequently recalled. *Health & Saf.C. 108046(b)* requires manufacturers to provide for the safe return or appropriate disposal of recalled products. *Health & Saf.C. 108046(c)* specifies the steps a retailer must take once it receives a notice of recall. The Act does not displace any stricter requirements that may be imposed by a federal agency. (*Health & Saf.C. 108048*.)

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45. Rental-Purchase Agreements.

4 Witkin Sum. Cal. Law Sales § 380

[§ 380] Rental-Purchase Agreements.

The Karnette Rental-Purchase Act (C.C. 1812.620 et seq.) regulates personal property rental transactions in which the renter has the option to apply a portion of the rent toward purchase of the property. The statute governs the rental of property for personal, household, or family purposes for an initial term of 4 months or less. (C.C. 1812.622(d).) The rental-purchase agreement must be in writing and must contain specified information, including a description of the property, the total number and the total amount of periodic payments necessary to acquire the property, and a notice to the consumer of his or her rights and obligations under the agreement. (C.C. 1812.623.)

Consumers who enter into rental-purchase agreements are not permitted, among numerous other prohibitions: (1) to authorize the lessor to enter the consumer's dwelling to repossess the property; (2) to purchase insurance from the lessor against loss or damage to the property; (3) to waive their statutory rights or defenses; or (4) to grant a security interest in the property. (C.C. 1812.624.) The lessor may not require a security deposit in excess of 1 month's rental (C.C. 1812.625), may not charge a late fee except as specified (C.C. 1812.626), and may not sell a service contract for the property that provides coverage during the effective period of the rental-purchase agreement (C.C. 1812.635).

The consumer's liability for loss or damage to the property is limited to the lesser of (1) the fair market value of the property at the time of the loss or damage, or (2) the amount that would be necessary for the consumer to exercise his or her option to purchase. (C.C. 1812.627.) The consumer has the right to purchase the property at any time after the initial payment, at a price calculated according to the statute, and must be supplied with information about the difference between that price and the amount that the consumer would pay if he or she made regularly scheduled payments instead of exercising an early purchase option. (C.C. 1812.632.)

Violations of the statute subject the lessor to a suit for actual and exemplary damages (C.C. 1812.636), and a wilful violation constitutes a misdemeanor (C.C. 1812.647).

SUPPLEMENT: [This section is current through the latest supplement]

C.C. 1812.632, as amended in 2006, additionally gives the consumer the right to acquire ownership within 3 months of execution of the rental-purchase agreement by tendering "an amount equal to the cash price and any past due fees less all periodic payments that the consumer has paid."



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46. Retail Refund Policies.

4 Witkin Sum. Cal. Law Sales § 381

[§ 381] Retail Refund Policies.

C.C. 1723 regulates retail sellers that have a policy of not giving full cash or credit refunds, or of not allowing equal exchanges, for at least 7 days following the purchase of goods that are returned with proof of purchase. The retail seller must *conspicuously display* that policy either on signs posted at each cash register, sales counter, and public entrance; on tags attached to each item sold under the policy; or on order forms. The displayed information must state the store's policy, including whether cash refund, store credit, or exchanges will be given for the full purchase price; the applicable time period; the types of merchandise covered; and any other conditions governing the refund, credit, or exchange of merchandise. (C.C. 1723(a).)

A number of goods are *exempted*: food; plants; flowers; perishable goods; goods marked "as is," "no returns accepted," "all sales final," or with similar language; goods used or damaged after purchase; customized goods received as ordered; goods not returned with their original package; and goods that cannot be resold due to health considerations. (C.C. 1723(b).)

A retail store violating C.C. 1723 is liable to the buyer for the amount of the purchase if the buyer returns the goods, or attempts to return them, on or before the 30th day after their purchase. Violations are also subject to the remedies provided in C.C. 1750 et seq., the Consumers Legal Remedies Act (see *supra*, §296). (C.C. 1723(c).)

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47. Seller Assisted Marketing Plans.

4 Witkin Sum. Cal. Law Sales § 382

[§ 382] Seller Assisted Marketing Plans.

C.C. 1812.200 et seq. regulate the "seller assisted marketing plan." This is defined as a sale or lease or offer to sell or lease any product, equipment, supplies, or services for a total initial payment of more than \$ 500 but less than \$ 50,000, which will be used by the buyer to begin, maintain, or operate a business, when the seller has solicited the contract by various representations of earnings, market, etc. (C.C. 1812.201.) The statute calls for disclosures and provides civil and criminal penalties for fraudulent practices. (See *People v. Mott* (1983) 140 C.A.3d 394, 399, 189 C.R. 589 [sale of partnership interests in individual teams in national sports league for children, with league to dictate operating policies and provide services, constituted seller assisted marketing plan]; 10 *Pacific L. J.* 386; 84 *A.L.R.4th* 374.)

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48. Seminar Sales Solicitation Contracts.

4 Witkin Sum. Cal. Law Sales § 383

[§ 383] Seminar Sales Solicitation Contracts.

C.C. 1689.20 et seq. regulate "seminar sales solicitation contracts," defined as contracts for the sale or rental of goods or services of \$ 25 or more made using selling techniques in a seminar setting. (C.C. 1689.24(a).) A buyer may cancel until midnight of the third business day after the day the buyer signed the contract. (C.C. 1689.20.) The contract must be written in the same language used in the oral sales presentation, and must contain a statement concerning the buyer's cancellation rights in at least 10-point boldface type located in immediate proximity to the signature line. (C.C. 1689.21.) Within 10 days after cancellation, the seller must tender to the buyer any payments made, or any outstanding notes or evidences of indebtedness. (C.C. 1689.22.) Upon demand and within 20 days after cancellation, the buyer must tender to the seller any goods the seller had previously delivered. If the seller fails to demand possession within 20 days, the goods become the buyer's property. (C.C. 1689.23; see Cal. Civil Practice, 5 Business Litigation, §52:30 et seq.)

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49. Solicitation of Insurance by Lender.

4 Witkin Sum. Cal. Law Sales § 384

[§ 384] Solicitation of Insurance by Lender.

Ins.C. 770.1 requires lenders (other than industrial loan companies, personal property brokers, consumer finance lenders, or commercial finance lenders) to comply with a borrower's signed statement directing that fire or casualty insurance information not be disclosed to any person for the purpose of soliciting insurance coverage. (See *5 Pacific L. J. 441*; *Ins.C. 770* [lender prohibited from conditioning financing upon borrower's use of particular insurance agent]; for similar prohibition on seller of real property, see *Ins.C. 776*; 1 *Summary* (10th), *Contracts*, §590.)

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50. Sports Memorabilia.

4 Witkin Sum. Cal. Law Sales § 385

[§ 385] Sports Memorabilia.

C.C. 1739.7 regulates the sale of autographed sports memorabilia. "Autographed" means bearing the actual signature of a personality signed by that individual's own hand. (C.C. 1739.7(a)(1).) Dealers who offer or sell to consumers collectibles described as being autographed must furnish a certificate of authenticity at the time of sale. (C.C. 1739.7(b) [describing form and contents of certificate].) A consumer injured by a dealer's failure to provide a proper certificate is entitled to recover actual damages, a civil penalty equal to 10 times the actual damages, court costs, reasonable attorneys' fees, interest, and expert witness fees. The court may award additional damages based on the egregiousness of the dealer's conduct. (C.C. 1739.7(g) [remedies are in addition to any other remedy provided by law].) (See *Gentry v. eBay* (2002) 99 C.A.4th 816, 827, 121 C.R.2d 703 [in action by purchasers of forged autographed sports items who had acquired items by placing bids with defendant Internet auction provider and who alleged that defendant failed to furnish certificates of authenticity as required by C.C. 1739.7, trial judge properly sustained defendant's demurrer; defendant was not dealer within meaning of statute]; 33 Proof of Facts 3d 359 [Sports Memorabilia Dealer's Liability to Collector].)

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51. Sports Trading Cards.

4 Witkin Sum. Cal. Law Sales § 386

[§ 386] Sports Trading Cards.

B. & P.C. 21671 provides that any sports trading card that is altered or refurbished must be accompanied by a certificate stating the exact work done, the date the work was performed, the cost of the work, and the name, address, and phone number of the person who performed the work. (*B. & P.C. 21671(a)*.) A person who knowingly sells or trades a sports card in violation of *B. & P.C. 21671(a)* must give the buyer a full refund, and is liable to the buyer for a civil penalty not exceeding \$ 5,000 per violation. (*B. & P.C. 21671(b)*) [each card sold constitutes a separate violation]; see *B. & P.C. 21672* [person who knowingly manufactures, produces, or distributes unlicensed or counterfeit sports trading card, or who knowingly sells cut, unlicensed sports trading card, with intent to defraud is guilty of misdemeanor, and is liable for civil penalty]; *24 Pacific L. J. 662*.)

SUPPLEMENT: [This section is current through the latest supplement]



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52. Supermarket Club Cards.

4 Witkin Sum. Cal. Law Sales § 387

[§ 387] Supermarket Club Cards.

C.C. 1749.60 et seq. prohibit a supermarket club card issuer from requiring a card applicant to provide a driver's license or Social Security card number as a condition of obtaining the card (C.C. 1749.64), and, with specified exceptions, prohibit the issuer from selling or sharing the cardholder's personal information (C.C. 1749.65). A violation of these provisions is "unfair competition," punishable as specified in *B. & P.C. 17200* et seq. (C.C. 1749.63; see 13 *Summary* (10th), *Equity*, §105 et seq.) The protections afforded by these provisions may not be waived. (C.C. 1749.66.)

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53. Swap Meets and Flea Markets.

4 Witkin Sum. Cal. Law Sales § 388

[§ 388] Swap Meets and Flea Markets.

B. & P.C. 21660 et seq. require the "reporting of personal property exchanged, sold, or offered for sale or exchange at swap meets, flea markets, and open-air markets, and information regarding vendors selling or displaying new merchandise," to ensure that those participating in such events comply with applicable laws and regulations. Under *B. & P.C. 21661*, the term "swap meet" includes a flea market or open-air market and means "an event at which two or more persons offer merchandise for sale or exchange," and at which one of the following applies:

- (1) A fee is charged for the privilege of offering or displaying merchandise for sale or exchange.
- (2) A fee is charged to prospective buyers for parking or admission.
- (3) The event is held more than 6 times in any 12-month period.

Event operators and vendors are exempted from the requirements of *B. & P.C. 21650* et seq. (requiring junk dealers and secondhand dealers to furnish evidence of authority to sell certain products). (*B. & P.C. 21660*.) Vendors must report all merchandise offered or displayed for sale or exchange on a form prescribed or approved by the California Department of Justice that contains specified information. (*B. & P.C. 21663*.) Under certain specified circumstances, the reporting requirement does not apply to vendors selling or displaying new merchandise and vendors holding a business license issued by a city or county. (*B. & P.C. 21663.1*.) Vendors are prohibited from offering or displaying property of a kind which the swap meet operator has expressly prohibited. (*B. & P.C. 21666(b)*.)

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54. Sweepstake Entry Materials.

4 *Witkin Sum. Cal. Law Sales* § 389

[§ 389] Sweepstake Entry Materials.

B. & P.C. 17539.15 prohibits solicitation materials containing sweepstakes entry materials from representing that a person is a prizewinner unless that person has in fact won a prize. It also requires the materials to state prominently that no purchase is required to enter the sweepstakes, and to include a copy of the rules. A sweepstakes entry not accompanied by an order for goods or services may not be subjected to any disability or disadvantage in the winner selection process, as compared to entries accompanied by orders. (On *B. & P.C. 17539.5*, prohibiting solicitation or sale of information-access services in any manner related to sweepstakes, see 2 *Cal. Crim. Law (3d)*, *Crimes Against Property*, §219; see also 64 *A.L.R.4th* 1021 [rights and remedies of entrants in private contest or lottery].)

SUPPLEMENT: [This section is current through the latest supplement]

B. & P.C. 17539.15 was amended in 2008 to apply additionally to "solicitation materials selling information regarding sweepstakes."



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55. Telephone Sellers.

4 Witkin Sum. Cal. Law Sales § 390

[§ 390] Telephone Sellers.

(1) *In General.* *B. & P.C. 17511* et seq. regulate persons who solicit sales over the telephone. A "telephonic seller" (defined in *B. & P.C. 17511.1*) must (a) register with the Department of Justice and pay a filing fee (*B. & P.C. 17511.3, 17511.4*); (b) provide information to prospective purchasers concerning any gifts, premiums, bonuses or prizes; specified information if the solicitation constitutes a home solicitation contract or offer as defined in C.C. 1689.5 (supra, §329); and information concerning any minerals, oil, gas, or office equipment or supplies offered for sale (*B. & P.C. 17511.5*); (c) appoint the Attorney General as its attorney to receive service (*B. & P.C. 17511.6*); and (d) make no reference to its compliance with *B. & P.C. 17511* et seq. to any prospective purchaser (*B. & P.C. 17511.7*).

B. & P.C. 17512, 17513 impose restrictions on the ways in which telephone transaction disputes may be resolved. (See 2 *Cal. Crim. Law (3d)*, *Crimes Against Property*, §217; *Cal. Civil Practice*, 6 Business Litigation, §61:38.)

(2) *Bond Requirement.* *B. & P.C. 17511.12* requires a telephonic seller to maintain a *bond* of \$ 100,000 in favor of the state for the benefit of any person suffering pecuniary loss due to a violation of *B. & P.C. 17511* et seq. Where a telephonic seller conducts a promotion offering a premium valued at \$ 500 or more, an additional bond equal to the value of the premium is required, and the telephonic seller must notify the Attorney General of the details of the promotion at least 10 days prior to its inception. Within 45 days after the date disclosed to the Attorney General for the award of premiums, the telephonic seller must provide proof that all premiums were awarded. (For enforcement of surety's liability on bond, see *B. & P.C. 17511.12(c), (d)*.)

(3) *Penalties.* A salesperson who solicits on behalf of an unregistered seller is subject to imprisonment in county jail for not more than 6 months, or by a fine not exceeding \$ 2,500, or both. (*B. & P.C. 17511.8*.) Fraud, deceit, or other violations of *B. & P.C. 17511* et seq. are punishable by a fine not exceeding \$ 10,000 for each unlawful transaction, or imprisonment in state prison or in the county jail for not more than 1 year, or both. (*B. & P.C. 17511.9*.)

The remedies specified in *B. & P.C. 17511* et seq. are in addition to any procedures or remedies provided by other law. (*B. & P.C. 17511.10*.) Further, under C.C. 1670.6, any contract for goods or services for personal, family, or household use that is made by telephone solicitation is unlawful if the telemarketer fails to comply with the federal Telemarketing Sales Rule (see 16 C.F.R., Part 310), prohibiting certain deceptive or abuse practices.

(4) *Blocking of Unwanted Solicitations.* *B. & P.C. 17590* et seq. protect the privacy of telephone subscribers who do not wish to receive unsolicited and unwanted telephone solicitations. The provisions were originally adopted in 2001, but they were amended in 2003 after the Federal Trade Commission announced its intention to create a national "do not call" list. Under *B. & P.C. 17590*, the California telephone numbers contained in the FTC's "do not call" list are adopted as California's "do not call" list. Under *B. & P.C. 17591*, the following acts are prohibited: (a) use of the "do not call" list for any purpose other than to comply with *B. & P.C. 17591* et seq. or applicable federal laws; (b) denial or interference with a subscriber's right to place a California telephone number on the list; (c) causing a subscriber to participate in the list without the subscriber's knowledge or consent; (d) sale or lease of the list to a person other than a telephone solicitor; (e) sale or lease by a telephone solicitor of the "do not call" list; (f) charging a fee to place a telephone number on the list; and (g) persuading a subscriber with whom a solicitor has an established business relationship to put the subscriber's number on the list if the solicitation has the effect of preventing competitors from contacting that solicitor's customers. Beginning on the 31st day after the first "do not call" list is made available to telephone solicitors, a solicitor may not call any number on the list in order to offer a prize, rent, sell, exchange, promote, gift, or lease any goods or services, offer or solicit credit, seek certain marketing information, seek to sell or promote any investment, insurance, or financial services, or make any solicitation as described in *B. & P.C. 17511.1*, supra. (*B. & P.C. 17592(c)*.) Persons who sell, lease, exchange, or rent telephone solicitation lists, except for directory assistance and telephone directories, may not include in their lists any telephone numbers on the then current "do not call" list. (*B. & P.C. 17592(d)*.) The Attorney General, a district attorney, or a city attorney may bring an action to enforce these prohibitions (*B. & P.C. 17593(a)*), and any person who has received a solicitation prohibited by *B. & P.C. 17592* or whose telephone number has been used in violation of *B. & P.C. 17591* may bring a civil action in small claims court for an injunction or order to prevent further violations (*B. & P.C. 17593(b)*).

Pub.Util.C. 2875.5 prohibits the use of automatic calling equipment "that incorporates a storage capability of telephone numbers to be called or a random or sequential number generator capable of producing numbers to be called" to make telephone connections "for which no person, acting as an agent or telemarketer, is available for the person called."

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Blocking of Unwanted Solicitations.* *B. & P.C. 17592(f)*, which allows a telephone solicitor to contact by mail a subscriber whose telephone number appears on the national "do not call" list for permission to make telephone calls that would otherwise be proscribed, was amended in 2008 to specify what must be stated in the mailing. The amendment additionally specifies that where there is an established business relationship, "as defined under state or federal law," between a subscriber and a telephone solicitor, express written permission is not required. A solicitation of this type mailed to a subscriber who is *not* on the national "do not call" list must also disclose specified, but more limited, information. (*B. & P.C. 17514*, added in 2008.)



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56. Television Customer Service.

4 Witkin Sum. Cal. Law Sales § 391

[§ 391] Television Customer Service.

The Cable Television and Video Provider Customer Service and Information Act (*Govt.C. 53054 et seq.*) was intended "to encourage cable television and video providers to inform their customers about the standards they have established and to work to achieve these customer service goals." (*Govt.C. 53054.1(c).*) Cable television operators and video providers must establish customer service standards concerning matters such as installation, disconnection, service and repair obligations; billing and refund procedures; and complaint and bill dispute resolution procedures. (*Govt.C. 53055.*) Cable television operators and video providers must distribute annually to employees, customers, and local governments in their service area a notice describing their customer service standards. (*Govt.C. 53055.1.*)

The Video Customer Service Act (*Govt.C. 53088 et seq.*) regulates the relationship between video providers and their customers. The Act's provisions include requirements that video providers (1) notify their customers concerning the programming offered and the prices charged for that programming; (2) render bills that are accurate and understandable; (3) respond promptly to service outages; and (4) provide at least 30 days' written notice before increasing rates or deleting channels. (*Govt.C. 53088.2.*) The Act defines "video provider" as any person, company, or service that charges a fee for providing one or more channels of video programming to a residence, including providers of cable television, master antenna television, and satellite broadcasts. (*Govt.C. 53054.2, 53088.1.*) (See *Manibog v. MediaOne of Los Angeles* (2000) 81 C.A.4th 1366, 1371, 98 C.R.2d 297 [cable television provider's \$ 4.99 fee charged on late accounts violated \$ 4.75 delinquency fee limit imposed by *Govt.C. 53088.7*, notwithstanding provider's contention that \$ 4.99 included \$ 4.75 delinquency fee and 24 cents franchise fee that provider was required to pass through to city].)

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57. Ticket Sellers.

4 *Witkin Sum. Cal. Law Sales* § 392

[§ 392] Ticket Sellers.

(1) *In General.* *B. & P.C. 22500* et seq. regulate ticket sellers, defined as "any person who for compensation, commission, or otherwise sells admission tickets to sporting, musical, theatre, or any other entertainment event." (*B. & P.C. 22503.*) Ticket sellers must have a permanent address from which to sell tickets, and be licensed as required by any local jurisdiction (*B. & P.C. 22500*); must maintain records of ticket sales, deposits, and refunds (*B. & P.C. 22501*); must disclose prior to sale the location of the seats represented by the tickets (*B. & P.C. 22502*); and must disclose in any advertisement or promotion that they are adding a service charge (*B. & P.C. 22508*). Provision is also made for refunding a deposit or purchase price, and for bonds to provide for refunds. (*B. & P.C. 22506, 22507.*) A violation of *B. & P.C. 22500* et seq. constitutes a misdemeanor. (*B. & P.C. 22505.*) Anyone who violates the statute's address and licensing requirements is guilty of a misdemeanor and is liable for a civil penalty. (*B. & P.C. 22500.*)

(2) *Exclusions From Coverage.* Excluded from coverage are "primary contractors," defined as "the person or organization who is responsible for the event for which tickets are being sold" (*B. & P.C. 22503.5*); agents of carriers purchasing or selling tickets in conjunction with tour packages (*B. & P.C. 22503.6*); persons selling six tickets or less to any single event, provided the tickets are sold off the premises where the event is to occur (*B. & P.C. 22504*); and nonprofit charitable tax-exempt organizations selling tickets to events they sponsor (*B. & P.C. 22511*).

(3) *Seller's Ability To Provide Ticket.* *B. & P.C. 22502.1* prohibits a ticket seller from contracting for the sale of tickets, or accepting a deposit or full payment for tickets, unless the seller (a) possesses the tickets, (b) has a written contract to obtain the tickets, or (c) informs the purchaser, in the prescribed manner, that the seller does not possess the tickets and may not be able to supply them at the contracted price. Moreover, if a ticket seller represents that he or she can deliver a ticket at a specified price or within a specified price range, the seller must do so within a reasonable time or by the contracted time. (*B. & P.C. 22502.2.*) A ticket seller who violates *B. & P.C. 22502.1* or *22502.2* is civilly liable to the purchaser for (a) two times the contracted price of the ticket, (b) the purchaser's "nonrefundable expenses for attending or attempting to attend the event in good faith reliance on seat or space availability," and (c) reasonable attorneys' fees and court costs. (*B. & P.C. 22502.3.*)

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58. Travel Sellers.

4 Witkin Sum. Cal. Law Sales § 393

[§ 393] Travel Sellers.

(1) *In General.* *B. & P.C. 17550* et seq. regulate the sale of air and sea transportation by "sellers of travel," a term that excludes carriers, hotels and other lodging establishments that arrange transportation as an incident of their accommodations business, and motor clubs (*B. & P.C. 17550.1*). The areas covered include: (a) registration of sellers (*B. & P.C. 17550.20*); (b) requirement of a bond or a deposit into a trust account (*B. & P.C. 17550.11, 17550.15, 17550.16*); (c) the customer's entitlement to a ticket upon payment (*B. & P.C. 17550.17*); (d) refunds (*B. & P.C. 17550.14*); (e) the information to be supplied upon payment (*B. & P.C. 17550.13*); and (f) criminal penalties (*B. & P.C. 17550.19*).

(2) *Educational Travel Organizations.* *B. & P.C. 17552* et seq. regulate "educational travel organizations," which are persons, partnerships, corporations, or other entities offering educational travel programs for students residing in California. (*B. & P.C. 17552(a)*.) "Educational travel program" means travel services arranged through or offered to an elementary or secondary school in California where the services are represented to include an educational program as a component. (*B. & P.C. 17552(c)*.) An educational travel organization may not arrange an educational travel program until it has entered into a written contract, containing specified information, with the educational institution. (*B. & P.C. 17554*.) The educational travel organization may not place or use any misleading or untruthful advertising or statements, or make a substantial misrepresentation in conducting an educational program. (*B. & P.C. 17555*.) A civil action may be brought for violation of *B. & P.C. 17552* et seq. (*B. & P.C. 17556*), and a violation is also punishable as a misdemeanor (*B. & P.C. 17556.5*).

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* *B. & P.C. 17550.1* was amended in 2006 to expand the exclusions from "sellers of travel" to include a "motor or rail carrier or water vessel operator" holding the permit or license required by law.

On sellers of travel discount programs and travel business discount programs, see *B. & P.C. 17550.26, 17550.27*, added in 2006.



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59. Unaccredited Law Schools.

4 *Witkin Sum. Cal. Law Sales* § 394

[§ 394] Unaccredited Law Schools.

B. & P.C. 6061 provides that any law school not accredited by the State Bar must furnish new students with a statement disclosing its nonaccredited status, the qualifications of its faculty, and its recent attempts to obtain accreditation. Schools founded less than 10 years previously must state their assets and liabilities. Unless furnished by a correspondence school, the statement must also disclose the success of the school's students in the bar examinations, the size of its law library, and its student-faculty ratio. Any school not complying must refund all fees paid by students. Under *Educ.C. 94362, 94363*, enforcement duties are assigned to the Attorney General, to whom the Council for Private Postsecondary and Vocational Education must report possible violations. (See *Goehring v. Chapman (2004) 121 C.A.4th 353, 379, 17 C.R.3d 39* [in mandating individual refunds for violation of *B. & P.C. 6061*, Legislature intended to confer private right of action].)

SUPPLEMENT: [This section is current through the latest supplement]

See 5 *A.L.R.6th* 449 [Rights and Liabilities of Unaccredited Law Schools and Their Students].*Correction:* Page 344, third to last line, "*Goehring v. Chapman*" should be "*Goehring v. Chapman University*".



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60. Unsolicited Sending of Merchandise or Services.

4 Witkin Sum. Cal. Law Sales § 395

[§ 395] Unsolicited Sending of Merchandise or Services.

C.C. 1584.5 prohibits sellers from offering goods or services for sale where the offer includes the voluntary and unsolicited sending or providing of such goods or services not actually ordered or requested. (See 1 *Summary* (10th), *Contracts*, §196; Cal. Civil Practice, 5 Business Litigation, §52:37; 39 *A.L.R. Fed* 674 [39 *U.S.C.*, §3009, making it an unfair trade practice to mail unsolicited merchandise].)

SUPPLEMENT: [This section is current through the latest supplement]



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61. Used Mobilehomes.

4 Witkin Sum. Cal. Law Sales § 396

[§ 396] Used Mobilehomes.

Legislation enacted in 1974, permitting licensed real estate brokers to sell used mobilehomes already in place in a mobilehome park or other authorized location, includes special protections for buyers. (*B. & P.C. 10131.6, 10131.7, 10177.2.*) The broker is prohibited from: (1) representing that a mobilehome is new (*B. & P.C. 10131.7(c)*); (2) including purported licensing or transfer costs in the price when they are not in fact owed (*B. & P.C. 10131.7(d)*); (3) falsely representing that the mobilehome is equipped for highway operation (*B. & P.C. 10131.7(e)*); (4) falsely representing that no downpayment is required when in fact the buyer is advised to finance a required downpayment by an additional loan (*B. & P.C. 10131.7(f)*); (5) failing to complete various steps to transfer registered ownership to a purchaser (*B. & P.C. 10131.7(g)*). (See *6 Pacific L. J. 180.*) Certain fraudulent acts in registering or transferring mobilehomes are made grounds for discipline by the Real Estate Commissioner. (*B. & P.C. 10177.2.*)

SUPPLEMENT: [This section is current through the latest supplement]



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61A. (New) Used Vehicle Certification Programs.

4 Witkin Sum. Cal. Law Sales § 396A

[§ 396A] (New) Used Vehicle Certification Programs.

Under *Veh.C. 11713.18*, added in 2005, a dealer may not advertise for sale, or sell, a used vehicle as "certified," or otherwise describe a used vehicle in such a way as to imply that it meets the terms of a used vehicle certification program, if any of several enumerated circumstances apply, including that the vehicle's title has been inscribed with a lemon law, salvage, or similar notation, the dealer knows or should have known that the odometer was rolled back, the dealer knows that the vehicle has sustained frame damage, or the vehicle is being sold "as is." A violation of *Veh.C. 11713.18* is actionable under C.C. 1750 et seq. (text, §296), the Unfair Competition Law (*B. & P.C. 17200* et seq.; 13 *Summary* (10th), *Equity*, §105), *B. & P.C. 17500* (false advertising; see 13 *Summary* (10th), *Equity*, §109), and any other applicable state or federal law.

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61B. (New) Used Vehicle Contract Cancellation Options.

4 Witkin Sum. Cal. Law Sales § 396B

[§ 396B] (New) Used Vehicle Contract Cancellation Options.

Veh.C. 11713.21, added in 2005, prohibits a dealer from selling a used vehicle, as defined in *Veh.C. 665*, with a purchase price of less than \$ 40,000 to an individual for personal, family, or household use without first offering the buyer a contract cancellation option agreement. The statute places limits on the cost of the option, requires that it be contained in a document separate from the conditional sale contract or other purchase agreement, and specifies what provisions, at a minimum, it must include. The time within which the buyer must exercise the right to cancel may not be earlier than the dealer's close of business on the second day following the day on which the vehicle was originally delivered to the buyer by the dealer. *Veh.C. 11713.21* does not apply to motorcycles, as defined in *Veh.C. 400*, or recreational vehicles, as defined in *Health & Saf.C. 18010*.

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62. Water Treatment Contracts.

4 Witkin Sum. Cal. Law Sales § 397

[§ 397] Water Treatment Contracts.

B. & P.C. 17577 et seq. regulate promoters of water treatment devices. *B. & P.C. 17577.2* prohibits untrue or misleading statements concerning the presence or harmfulness of contaminants in a person's water, and places restrictions on precipitation testing of a consumer's water, and on product performance or benefit claims. Contracts subject to approval for the sale or rental of water treatment devices are home solicitation contracts regardless of where the contract or offer is made, and are subject to C.C. 1689.5 et seq. (supra, §329) if the contract arises out of a promotional presentation held elsewhere than a private residence. (*B. & P.C. 17577.3.*) No contract for sale or rental of a water treatment device can provide for a lien on real property, and any lien taken is void and unenforceable. (*B. & P.C. 17577.5.*) Violations of *B. & P.C. 17577* et seq. are misdemeanors (*B. & P.C. 17577.4*), and a buyer or renter of a water treatment device can bring an action for equitable relief, and to recover actual damages, exemplary damages, and reasonable attorneys' fees and costs (*B. & P.C. 17577.6(a)*). A waiver of *B. & P.C. 17577* et seq. is void and unenforceable. (*B. & P.C. 17577.6(d).*)

SUPPLEMENT: [This section is current through the latest supplement]

See *People v. PuriTec* (2007) 153 C.A.4th 1524, 1531, 1536, 64 C.R.3d 270 [*B. & P.C. 17577.2(c)* and *Health & Saf.C. 116835*, which prohibit seller of water treatment device from making performance or benefit claims that device affects health or safety of drinking water unless device has been state-certified, are constitutional].



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63. Weight Loss Contracts.

4 Witkin Sum. Cal. Law Sales § 398

[§ 398] Weight Loss Contracts.

C.C. 1694.5 et seq. regulate contracts with programs or centers offering instruction, counseling, or supervision in weight reduction by persons other than licensed health care professionals. (C.C. 1694.5 [excluding contracts for health studio services defined in C.C. 1812.81 (*supra*, §362)].) A buyer may cancel a weight loss contract until midnight of the third business day after the day the buyer signed the agreement. (C.C. 1694.6.) The weight loss contract must be in writing (C.C. 1694.7(a)), and state the buyer's right to cancel, without penalty or obligation, in at least 10-point boldface type near the signature line (C.C. 1694.7(b)). The contract must also state that the buyer may be relieved of the payment obligations in the event of the buyer's death, disability, or relocation more than 50 miles from the weight loss center. (C.C. 1694.8.) The payment or financing period may not exceed 2 years from the date of the contract, and the contract term may not be measured by the buyer's life. (C.C. 1694.7(d).) Contracts not complying with C.C. 1694.5 et seq. are void and unenforceable (C.C. 1694.9(a)), and buyers may recover treble damages and attorneys' fees (C.C. 1694.9(c)). A waiver of C.C. 1694.5 et seq. by a buyer is also void and unenforceable. (C.C. 1694.9(e).)

SUPPLEMENT: [This section is current through the latest supplement]