Title
When Court-Made Rules Fail: Leveraging the Private Market to Stop Misinformation in Advertising

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Abstract

The internet has given large corporations huge platforms to spread misinformation in their advertising. Due to the statute of limitations defense, government agencies are unable to effectively discourage this misinformation by themselves. Companies using the defense are more protected from government-led lawsuits the longer they get away with spreading false information, giving them little reason to stop making those misrepresentations. Traditionally, for situations when the statute of limitations defense has produced seemingly inequitable results, courts have developed exceptions to the usual rules of the defense. However, none of the exceptions permit the government to discourage consumer fraud without dismantling the statute of limitations defense. This article argues that because of the statute of limitations defense, government agencies alone are unable to stop misinformation in advertising. Therefore, they should focus their broad investigative powers on exposing the fraud and stopping it with injunctive relief. Once the fraud is exposed, plaintiffs in the private market can seek their own relief. Their lawsuits face much less restrictive statute of limitations rules than government-led lawsuits. Corporations will be discouraged from committing fraud because they know that, even if they are successful for a long time, they will remain vulnerable to private plaintiffs. This joint action by the government and the private market will discourage misinformation in advertising without doing undue damage to the statute of limitations defense.

Introduction

With digital content and social media becoming a bigger part of American life, the U.S. government's role in discouraging corporate misinformation must be reexamined. From

Instagram and Twitter to late-night infomercials, large companies have gained huge platforms to make false and misleading statements about their products and services. Whether they are pharmaceutical companies promising the safety of dangerously addictive opioids, for-profit schools showing off campuses that do not exist, or big banks pushing their lenders towards fraudulent subprime loans, big corporations have used these online platforms to reap massive private profits.[1]

Public entities like government agencies are playing an increasingly large role in stopping this misinformation. In the wake of the Great Recession of 2008, Congress created the Consumer Financial Protection Bureau to safeguard consumers from unscrupulous banks and loaners.[2] In more recent years, states have quickly expanded the branches of their justice departments that are responsible for combating consumer fraud.[3] This article will focus on one department in particular: the California Department of Justice (CA DOJ) which enforces the Unfair Competition Law (UCL) and the False Advertising Law (FAL).[4] In enforcing two of the strongest consumer protection statutes in the country, the CA DOJ is a good model for a government's role in stopping consumer fraud as well as the limits of that role. The UCL and FAL allow the CA DOJ to seek civil penalties for misrepresentations and injunctive relief to

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[1] Jan Hoffman, *Purdue Pharma Is Dissolved and Sacklers Pay $4.5 Billion to Settle Opioid Claims,* N.Y. Times (Sept. 1, 2021), https://www.nytimes.com/2021/09/01/health/purdue-sacklers-opioids-settlement.html; Richard Pérez-Peña, *Federal Lawsuit Accuses For-Profit Schools of Fraud*, N.Y. Times (Feb. 19, 2014), https://www.nytimes.com/2014/02/20/us/lawsuit-accuses-for-profit-schools-of-fraud.html; Rebecca Davis O'Brien, *Ex-Executive at Deutsche Bank Accused in Subprime Loan Case,* The Wall Street Journal (Sept. 11, 2017), https://www.wsj.com/articles/ex-executive-at-deutsche-bank-accused-in-subprime-loan-case-1505180613.

[2] Alan Rappeport, *Under New Leadership, the C.F.P.B. Lives On,* N.Y. Times (Dec. 19, 2018), https://www.nytimes.com/2018/12/19/us/politics/new-leadership-cfpb-name.html.

[3] The Office of the Governor, *Governor Newsom Signs Consumer Financial Protection Legislation to Combat Predatory Practices and Increase Transparency,* Office of Governor Gavin Newson (Oct. 4, 2021), https://www.gov.ca.gov/2021/10/04/governor-newsom-signs-consumer-financial-protection-legislation-to-combat-predatory-practices-and-increase-transparency/.

[4] Strook, *California's Unfair Competition Law and Consumers Legal Remedies Act*, 2, 3, 2020

prevent further false advertising from being carried out.[5] However, both laws have statutes of limitations that set time frames for when a lawsuit can be filed, weakening the CA DOJ's ability to stop misinformation in advertising.[6] As a consequence of the statute of limitations, a curious situation arises: companies are further protected the longer they get away with spreading false information, giving them little reason to stop making those misrepresentations. When the statute of limitations defense leads to unintended results, the courts usually apply equitable exceptions to shift back to original policy goals.[7] However, when it comes to consumer fraud, none of the exceptions produce equitable results.

The CA DOJ alone is unable to effectively discourage consumer fraud without crippling the statute of limitations defense. Therefore, the department should reframe its role to work alongside private parties such as individual plaintiffs. Instead of attempting to stop corporate misinformation with penalties and injunctive relief, the CA DOJ should focus its investigative powers on unrooting the bad act itself and then stopping it with injunctions. Once the misrepresentations have been uncovered, private plaintiffs can pursue lawsuits that face less restrictive statute of limitations rules than government-led lawsuits. Even if the fraud occurred for a long time, knowing that private plaintiffs can sue long after the misrepresentation occurred will dissuade corporations from committing any fraud at all. Ultimately, a joint effort between the CA DOJ and individual plaintiffs will stop companies from making false and misleading statements about their products and services.

This article has three parts. Part I will discuss the UCL and the FAL and their statutes of limitations. Part II will examine the four equitable exceptions to the statute of limitations

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[5] Colgan v. Leatherman Tool Group, Inc., 135 Cal. App. 4th 663, 701 (2006).; People v. Overstock.com, Inc., 12 Cal. App. 5th 1064, 1088 (2017).
[6] Cal Bus & Prof. Code § 17208 (LEXIS NEXUS 1941).; CA CIV PRO § 338.
[7] Aryeh v. Canon Business Solutions, Inc, 292 P.3d 871 (Cal. 2013).

recognized by the California Supreme Court and why each exception is unsuitable to be used by the CA DOJ to discourage fraud. Part III will argue that, to effectively stop companies from making false and misleading statements, the CA DOJ cannot act alone but must work in conjunction with private plaintiffs.

I. The UCL and FAL and Their Statutes of Limitations

The UCL and FAL both prohibit companies from making false and misleading statements in their advertising.[8] A corporation that makes one misrepresentation violates both laws, allowing the CA DOJ to use the UCL and FAL to pursue two civil penalties for one act.[9] To be liable for penalties or injunctive relief under the UCL and FAL, a defendant must have made a misrepresentation negligently.[10] There is no need to show that the misrepresentation was made intentionally, a much higher standard that is harder to prove.[11]

Both the CA DOJ and private plaintiffs may use the UCL and FAL in court to pursue injunctive relief and restitution.[12] Injunctive relief is a court order for defendants to act a certain way, such as requiring them to take down misrepresentations or make affirmative statements correcting those misrepresentations.[13] Restitution is monetary compensation for damage done.[14] Unlike private plaintiffs, the CA DOJ can also pursue civil penalties, which go a step beyond restitution as a form of punishment that labels defendants as wrongdoers.[15]

While the UCL and FAL are both powerful laws, each is restrained by a statute of limitations that sets a maximum amount of time a plaintiff has to initiate legal proceedings. The

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[8] Cal Bus & Prof. Code § 17500 (LEXIS NEXUS 1941).; Cal Bus & Prof. Code § 17200 (LEXIS NEXUS 1941).
[9] *Id.*
[10] Kasky v. Nike, Inc., 45 P.3d 243 (Cal. 2002).
[11] *Id.*
[12] *Colgan*, 135 Cal. App. 4th at 701.*;* *Overstock.com.*, 12 Cal. App. 5th at 1088.
[13] *Wex* (2020) available at LII-Wex.
[14] *Wex* available at LII-Wex.
[15] Gabelli v SEC, 568 U.S. 442, 443 (2013).

UCL has a statute of limitations of four years, and the FAL has a statute of limitations of three years.[16] A statute of limitations serves several purposes. First, such a provision protects defendants from claims surrounding issues that occurred a long time ago.[17] By requiring plaintiffs to file suits within a certain time frame, the courts provide defendants the chance to build their defense by gathering evidence and witnesses while they are still around.[18] Second, courts prefer to use their limited resources on recent issues that likely have more social importance than past matters.[19] Additionally, cases from further in the past generally cost more money, involve a more complex, dated set of facts, are more time-consuming, and run a greater risk of judicial error.[20] Finally, a statute of limitations gives defendants, and the individuals who interact with those defendants, peace over acts made a long time ago.[21] Individuals and companies can make business and employment decisions without the worry that a decades-old lawsuit will emerge.[22]

In most cases, a statute of limitations starts running the moment an act occurs whether the plaintiff knows about it or not.[23] However, a problem arises in fraud cases: the more sophisticated a fraud, the longer it takes for the plaintiff to realize and start legal proceedings. Therefore, a lawsuit against more effectively made misrepresentations is more likely to be blocked by the statute of limitations, essentially encouraging successful fraud. Courts have long recognized that the statute of limitations can raise equitable concerns in situations such as these.

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16 Cal Bus. & Prof. Code § 17208 (LEXIS NEXUS 1941); CA CIV PRO § 338.
17 Order of R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1943).
18 *Id.*
19 *Id.*
20 James R. MacAyeal, *The Discovery Rule and the Continuing Violation Doctrine as Exceptions to the Statute of Limitations for Civil Environmental Penalty Claims*, 15 VA. ENVTL. L.J. 589, 591 (1996).
21 Wilson v. Garcia, 471 U.S. 261, 271 (1985); Tulsa Professional Collection Services., Inc., v. Pope, 485 U.S. 478, 486 (1988).
22 *Id.*
23 Pooshs v. Philip Morris USA, Inc., 250 P.3d 181 (Cal. 2011).

Sometimes a violation can be part of one long scheme that only becomes clear to the plaintiff after the statute of limitations has expired.[24] In other circumstances, defendants actively hide their wrongdoing from potential plaintiffs.[25] For these situations, courts have developed four equitable exceptions to the usual rules "to align the actual application of the limitations defense more closely with the policy goals animating it."[26]

II. The Four Equitable Exceptions to the Statute of Limitations

The four equitable exceptions recognized by the California Supreme Court are the theory of continuous accrual, the continuing violations doctrine, the discovery rule, and the theory of fraudulent concealment.[27] Courts have developed tests and rules for these exceptions to determine when they may be used in particular cases.[28] None of the exceptions allow the CA DOJ to effectively discourage or prevent fraud in UCL and FAL cases.

A. The Theory of Continuous Accrual and the Continuing Violations Doctrine

The similarities between the theory of continuous accrual and the continuing violations doctrine make them easiest to understand in relation to each other. The California Supreme Court distinguished them in *Aryeh vs. Canon Business Solutions, Inc.* In *Aryeh*, the plaintiff paid a monthly lease to a company to use a copier. However, due to the company's negligence, the copier miscounted the number of pages printed and the plaintiff paid too much over the span of many months. When the plaintiff found out, he sued the company under the UCL.[29] The

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[24] Kyle Graham, *The Continuing Violations Doctrine*, 43 Gonz. L. Rev. 271, 288 (2007/2008)
[25] *Id.*
[26] *Aryeh*, 292 P.3d at 871.
[27] *Id.*
[28] *Id.*
[29] Although this case was only about the UCL, it likely serves as precedent for the FAL too, since the two are so closely linked, and FAL cases are almost always brought with the UCL attached.

defendant raised the statute of limitations defense, saying that because the miscounting had started over four years ago, the statute of limitations for the UCL, the lawsuit was time-barred.

The California Supreme Court disagreed with the defendant, deciding that the lawsuit was protected by the theory of continuous accrual but not by the continuing violations doctrine. Under the theory of continuous accrual, if a party has broken the law for a long time, it may be sued for more recent violations made within the statute of limitations.[30] However, all the defendant's older violations must be let go. On the other hand, the continuing violations doctrine strings every violation together into one long scheme.[31] As long as the last violation occurred within the statute of limitations, every previous violation may be pursued. The continuing violations doctrine is commonly used in nuisance or harassment cases, in which the conduct is ongoing and individual acts are clumped together for the purposes of the statute of limitations.[32]

Following the ruling in *Aryeh*, it appears that UCL lawsuits may use the theory of continuous accrual but not the continuing violations doctrine. This decision leads to odd results in government-led fraud cases that use the UCL. When using the theory of continuous accrual, the CA DOJ may sue violations made less than four years before the complaint date; in other words, within the UCL's statute of limitations. Every day, old violations are barred, and new violations replace them. The longer the party successfully defrauds the public, the more violations are protected by the statute of limitations. Under this scheme, the penalties defendants must pay under the UCL and FAL become predictable costs that can be factored in year to year, weakening the penalties' ability to discourage fraud. It is unlikely that this outcome was the intent of the statute of limitations. The *Aryeh* court stated that equitable exceptions such as the

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[30] *Aryeh*, 292 P.3d at 875.
[31] *Id. at 880.*
[32] Town of Troy v. Cheshire R.R. Co., 23 N.H. 83 (N.H. 1851).; Ellison v. Brady, 924 F.2d 872, 881-82 (9th Cir. 1991).

theory of continuous accrual were designed "to align the actual application of the limitations defense more closely with the policy goals animating it."[33] Therefore, the theory of continuous accrual, as defined by that same *Aryeh* court, does not function well in government-led consumer fraud cases.

Moreover, the *Aryeh* court's reasoning in refusing to apply the continuing violations doctrine to the UCL case is not persuasive. Implicitly, the court uses a two-part test that potentially contradicts the intent of the continuing violations doctrine and does not account for the variety of ways that the UCL may be used to pursue a lawsuit. The two-part test seems to be: (1) there is not a series of discrete, independently actionable wrongs and (2) the wrongful conduct was only clear after the accumulation of a series of harms.[34] The court did not state whether a plaintiff must pass both parts or only one part of the test to use the continuing violations doctrine. In *Aryeh*, the plaintiff did not pass either part, and the court denied the use of the doctrine.

Here lies the contradiction in the court's reasoning. According to the *Aryeh* court, the continuing violations doctrine was created by judges to achieve certain goals. One of those goals is court efficiency.[35] The continuing violations doctrine allows parties to avoid going to court in response to every slight out of fear that, if they delay, they will be time-barred by the statute of limitations. On account of the doctrine, potential plaintiffs can feel more secure attempting to resolve the issue outside of court first or waiting to see if the issue resolves on its own. They know the doctrine will preserve their lawsuit should they ever choose to go back to it. The *Aryeh* court's two-part test contradicts this goal by barring lawsuits that contain independently

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[33] *Aryeh*, 292 P.3d at 871.
[34] *Aryeh*, 292 P.3d at 880.
[35] *Id. at 879.*

actionable wrongs under the doctrine. As a consequence of *Aryeh's* two-part test, plaintiffs cannot risk delaying their lawsuit by trying to resolve the issue outside of court. They must attempt to sue in response to every slight, hurting the goal of court efficiency.

The other potential problem is the narrowness of the reasoning as the court says nothing about the issue of omissions. If a party makes a misrepresentation, the test does not address whether the party has a continuing duty to remove or correct the misrepresentation. If there was no continuing duty then, after a misleading advertisement has been published for four years, neither the UCL nor the FAL could resolve it in any way.

A Seventh Circuit U.S. Court of Appeals case suggests it is possible that a continuing duty does exist. In *United States v. Spectrum Brands*, *Inc.*, the Seventh Circuit permitted the federal government to use the continuing violation doctrine to seek civil penalties using a federal consumer protection law. In *Spectrum*, the defendant failed to immediately notify the government that it was receiving complaints of a defective coffee maker that caused consumers to spill hot coffee on themselves.[36] Six years later, when the company finally did report the complaints, the government sued them for disclosing so late. In permitting use of the continuing violation doctrine, the Seventh Circuit said the limitations period started running when the company finally notified the government. The previous failure to inform had paused the limitations period.[37]

The *Spectrum* court applied the continuing violations doctrine because the company had a continuing obligation to inform the government of the defective product complaints. However, the *Spectrum* case is different from the *Aryeh* decision in one important way: the start of the statute of limitations was marked when the defendant disclosed the complaints to the

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[36] United States v. Spectrum Brands, Inc., 924 F.3d 337 (7th Cir. 2018).
[37] *Id.*

government.[38] It was important to the court that there be this ending point; otherwise, the statute of limitations would have effectively been eliminated, something the court wished to avoid. If that were the case, plaintiffs could theoretically wait decades for violations to build before filing a lawsuit. Such an act would strip defendants of their peace over acts made long ago, force courts to preside over old cases, and result in other concerns that a statute of limitations is intended to address.

The *Spectrum* court's decision reveals that the *Aryeh* court's two-part test ignores situations relating to omissions. Therefore, as the test used by the *Aryeh* court is incomplete, lower courts should be wary of relying on it to determine the applicability of the continuing violations doctrine to UCL cases.

Consequently, neither the theory of continuous accrual nor the continuing violation doctrine applies well to government led UCL and FAL cases. The theory likely violates the intent of the statute of limitations, and the doctrine rests on an underinclusive, possibly contradictory two-part test.

B. The Doctrine of Fraudulent Concealment

The doctrine of fraudulent concealment pauses the statute of limitations whenever a defendant causes a potential lawsuit to expire through deceptive conduct.[39] A famous example of this kind of deceptive conduct is a 1962 case in which the conspirators hid their antitrust scheme from potential plaintiffs by holding secret meetings, using public pay telephones, and destroying records relating to the conspiracies.[40] In *Community Cause v. Boatwright*, the California Court of Appeals asserted that the goal of the doctrine is to stop defendants from "taking advantage of

[38] *Id. at 350.*
[39] *Aryeh*, 292 P.3d at 875.
[40] Kansas City v. Federal Pacific Electric Co., 310 F.2d 271, 272 (8th Cir. 1962).

[their] own wrong by asserting the statute of limitations."[41] In the case, the plaintiff sued a politician under the Political Reform Act for hiding financial interest in a property.[42] Although the statute of limitations had passed, the court agreed that the doctrine of fraudulent concealment preserved the plaintiff's suit. The court concluded that the plaintiff had sued late only because the politician had deceptively hidden his interest in the property.[43]

In determining the applicability of the doctrine, the *Boatwright* court used its own two-part test that is widely accepted by other California courts and follows guidelines supported by legal scholars.[44] Their two-part test requires that plaintiffs (1) show the substantive elements of fraud and (2) provide a good reason for discovering the facts so late.

It would be difficult for a government agency like the CA DOJ to pass either part of this test. The court did not set a hard rule for how to meet the first part, but its decision did appear to hinge on the fact that the defendant had intentionally failed to disclose his financial interest in a property.[45] Showing that the defendant hid information intentionally is a high standard of proof for a plaintiff to meet, much higher than the usual standard for a UCL and FAL case, which requires proof that the defendant acted negligently.[46] Even though it is possible to meet the first part of the *Boatwright* test by showing intention rather than only negligence, it would be very difficult to do. Plaintiffs like the CA DOJ would probably consider it not worth doing since doing so would greatly limit the number of lawsuits that may be pursued.

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[41] Community Cause v. Boatwright, 124 Cal. App. 3d 888, 899 (1981).
[42] *Boatwright,* 124 Cal. App. 3d at 995.
[43] *Id.* at 897.
[44] Baker v. Beech Aircraft Corp., 39 Cal. App. 3d 315 (Ct. App. 1974); Pashley v. Pacific Elec. Ry. Co., 25 Cal. 2d 226 (Cal, 1944); Richard L. Marcus, *Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?*, 71 Geo. L.J. 829, 880 (1983)
[45] *Id.* at 901.
[46] People v. Superior Court (Olson), 96 Cal. App. 3d 181, 195 (1979).; (The court allowed the use of the doctrine of fraudulent concealment only because "[the defendant] concealed…information… to induce plaintiffs to enter into [a] loan").

Even if the CA DOJ could pass the first part of the test, it is unlikely that it could also pass the second part. The *Boatwright* court emphasized that the reason for late discovery of facts must include (1) when the fraud was discovered; (2) the circumstances under which it was discovered; and (3) that the plaintiff was not at fault for failing to discover it or had no actual or presumptive knowledge of facts sufficient to put him on inquiry.[47] In *Boatwright*, the plaintiff presented an adequate reason by showing that the type of interest the defendant hid was only known to the defendant and a few of his partners. The plaintiff only discovered the interest once it became public through documents filed in another lawsuit.[48]

Government plaintiffs struggle to meet the second part of the test. Agencies like the CA DOJ have a specific prerogative to seek out wrongdoing and have a unique ability to investigate claims. Moreover, courts have said that it would be difficult to ascertain when an agency, sometimes composed of different departments and hundreds of people, discovered the fraud.[49] At least for the purposes of collecting penalties, government agencies seem to never have an excuse for a late discovery.[50]

C. The Discovery Rule

According to the California Supreme Court, the discovery rule pauses the statute of limitations until the plaintiff discovers, or has reason to discover, a basis to file a lawsuit.[51] While the discovery rule may apply to private plaintiffs, the U.S. Supreme Court has barred at least one government agency from using it. In *Gabelli vs. SEC*, the U.S. Securities and Exchange Commission (SEC) pursued a civil enforcement action that sought monetary penalties from the

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[47] *Boatwright,* 124 Cal. App. 3d at 900.
[48] *Id.* at 901.
[49] *Gabelli*, 568 U.S. at 451
[50] *Id*.
[51] Norgart v. Upjohn Co., 21 Cal. 4th 383 (Cal., 1999).

defendant for defrauding investors.[52] In a unanimous decision, the Court ruled that the SEC could not use the discovery rule to preserve its lawsuit from being time-barred.[53]

The Court gave several reasons why government agencies may not use the discovery rule in instances where a private plaintiff might be able to. Unlike private plaintiffs, government agencies do not rely on apparent injury to learn that they have been wronged. In fact, their very purpose is to root out wrongdoing, and they have many legal tools to do so that are unavailable to private plaintiffs.[54] Therefore, the Court reasoned that government agencies should not benefit from the same discovery rule protections given to private plaintiffs. There are also practical concerns with allowing the government to use the discovery rule. It is difficult to know when government agencies should have known of a fraud because of the bureaucracy of such agencies: many are composed of hundreds of people scattered across different offices. For now, no test exists to determine when a government agency may use the discovery rule. The Supreme Court refused to make one in *Gabelli* and no other government agency has attempted to use the rule. While the Supreme Court is not a binding authority in California, it is a strong persuasive power. Therefore, it is unlikely that the CA DOJ can use the discovery rule to pursue civil penalties.

None of the current equitable exceptions allow government agencies to successfully discourage misrepresentations without dismantling the statute of limitations defense. Therefore, there needs to be an alternative way to solve the difficulties presented by the statutes of limitations in consumer fraud cases.

III. A Possible Path Forward Beyond the Equitable Exceptions

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[52] *Gabelli*, 568 U.S. at 446.
[53] *Id*.
[54] *Id* at 451.

In light of the statute of limitations defense, the CA DOJ struggles to effectively and equitably discourage fraud using any one of the four exceptions. The problem with the theory of continuous accrual is that it systematically discards old violations. This leads to a problematic situation where, over time, the statute of limitations starts protecting older violations and motivates companies to make false or misleading statements as well as they can. Nonetheless, the other three equitable exceptions also have their liabilities. The doctrine of fraudulent concealment likely requires a demonstration of intentional fraud, a standard that government plaintiffs struggle to meet. Additionally, the continuing violations doctrine and the discovery rule risk capturing every violation ever made and eliminating the time limit on penalty actions. The U.S. Supreme Court has warned that this elimination would be "utterly repugnant to the genius of our laws."[55]

Having exhausted the four equitable exceptions as options, this article turns to an alternative solution, one that would permit the CA DOJ to discourage fraud without impeding the UCL and FAL's statute of limitations. If partially time-barred by the statute of limitations, the CA DOJ should not attempt to recover all the losses from a company's wrongdoing alone. Rather, the department should focus its broad investigative powers on rooting out bad acts and then stopping them through injunctive relief, allowing consumers the opportunity to seek their own remedies in personal injury or class action markets. While plaintiffs in these markets need more protections against unscrupulous private attorneys, the market allows individuals to pursue claims long after the wrongdoing occurred. Companies will be discouraged from making misrepresentations because they know that, even if their fraud is successful for a long time, they will always be susceptible to individual lawsuits.

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[55] Adams v. Woods, 6 U.S. 336 (1805).

A. The CA DOJ's Use of Injunctive Relief

An injunction is a court order requiring a defendant to do or stop doing something and its potential uses are broad.[56] It can be an order for a defendant to cease activities, to modify a policy, to take safeguards against something, or to remove something from circulation. Courts use them when a defendant must stop its action to prevent injustice or harm to the plaintiff. However, since injunctions direct future action, they risk potentially limiting lawful as well as unlawful behaviors.[57] For example, a court may order a company to take down misleading advertisements, but the order must be made precisely to avoid requiring the company to take down perfectly honest advertisements, too.

Injunctive relief is considered one of the principal remedies in UCL and FAL cases.[58] It has been used by courts to require that defendants take down misrepresentations and make affirmative statements correcting those misrepresentations.[59] Relative to lawsuits seeking penalties, federal courts have been receptive to governmental use of injunctions. In *SEC v. Graham*, the Eleventh Circuit Court of Appeals allowed the SEC, the same government agency barred from using the discovery rule in *Gabelli*, to seek injunctions even though the statute of limitations had passed.[60] For the *Graham* court, civil penalties were barred but injunctions were not. In general, federal courts have used injunctive relief when the misconduct is likely to continue and require repetitive lawsuits.[61]

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[56] *Wex* (2020) available at LII-Wex.
[57] Sheppard Mullin Richter & Hampton LLP., *Trade Secret Litigants Take Note: California District Court Provides Guidance on Obtaining a Preliminary Injunction and Expedited Discovery*, XI, Nat. L.R. (2021).
[58] *Colgan,* 135 Cal. App .4th, 701.
[59] Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy, 4 Cal. App. 4th 963, 972 (1992).
[60] SEC v. Graham, 823 F.3d 1357, 6 (11th Cir. 2016).
[61] Elad Peled, *ARTICLE: Rethinking the Continuing Violation Doctrine: The Application of Statutes of Limitations to Continuing Tort Claims,* 41 Ohio N.U.L. Rev. 343, 384 (2015).

This broad legal precedent suggests the CA DOJ has strong authority to seek injunctions in its UCL and FAL cases, even after the statute of limitations has expired. The CA DOJ can uncover the fraud, seek a limited number of penalties using the theory of continuous accrual, and stop the fraud from continuing using injunctive relief. Once the misrepresentations are exposed, consumers may pursue private lawsuits. Ultimately, a joint effort between government agencies and private plaintiffs will discourage companies from committing fraud.

B. Consumers As Private Plaintiffs

Once consumers learn they have been defrauded, they can pursue lawsuits individually. When seeking civil penalties, private lawsuits do not face the same statute of limitations rules as the CA DOJ. This constant threat of a lawsuit will dissuade companies from committing fraud as they know that the statute of limitations will not protect them from private plaintiffs. The discovery rule, so ineffective in the hands of a government plaintiff, is devastatingly powerful for private plaintiffs. The rule keeps the statute of limitations from starting until the plaintiff discovers, or has a reason to discover, a basis to file a lawsuit.[62] Even if private plaintiffs had been defrauded long before, their lawsuits will likely be preserved considering the California Court of Appeals' decision in *Nelson v. Indevus Pharmaceuticals, Inc.*[63]

According to the *Nelson* court, the statute of limitations does not necessarily start when the wrongdoing itself is generally publicized. It only begins to run after the plaintiff has a reason to investigate, such as when they become aware of a personal injury.[64]

In *Nelson*, newspapers and research studies widely publicized a drug as having major side effects.[65] Years later, the plaintiff, who had taken the drug many years prior, started experiencing

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[62] *Aryeh*, 292 P.3d at 875.
[63] Nelson v. Indevus Pharmaceuticals, Inc., 142 Cal. App. 4th 1203, 1204 (Cal. Ct. App., 2006).
[64] *Nelson*, 142 Cal. App. 4th at 1203.
[65] *Nelson*, 142 Cal. App. 4th 1204.

the side effects, got tested, and found out her symptoms were because of the drug. She then sued the drug maker for personal injury.[66] The *Nelson* court said that, under the discovery rule, the statute of limitations only started to run when the plaintiff got tested, as she had no reason to suspect personal harm before.[67] It did not matter that she had missed the generally published news reports about the dangers of the drug because she had no obligation to be aware of them when still unaware of her own injury.[68]

As many potential plaintiffs in fraud cases are unaware of their own injuries, the discovery rule likely protects their lawsuits from the statute of limitations defense even if they find out very late. Patients do not know the opioids they are taking are dangerously addictive. Students do not know their for-profit school offers meaningless degrees. Loaners do not realize their banks are providing them with fraudulent loans. Companies wary of these lawsuits, which may take place long after the misrepresentations themselves are made, will be discouraged from committing fraud in the first place. However, relying on the personal injury or class action market to restrain companies has its flaws, as plaintiffs lack protections from potentially unscrupulous private lawyers.

C. The Personal Injury and Class Action Market

To sue, plaintiffs need personal injury or class action lawyers, who are sometimes called "ambulance chaser[s]" because of their eagerness to "prey on misfortunes."[69] Currently, some attorneys set up retainer agreements that allow them to take up to 45 percent of the compensation awarded. Other attorneys add expense provisions that pay for the attorneys' meals, hotel stays,

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[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] Margot Slade, *THE LAW; Personal Injury Lawyer: New Era, New Image*, N.Y. Times (Sept. 9, 1988), https://www.nytimes.com/1988/09/09/us/the-law-personal-injury-lawyer-new-era-new-image.html.

and travel by private plane.[70] Plaintiffs are often left with much less money than they had anticipated. If the CA DOJ is going to rely on the personal injury or class action market to discourage corporate fraud, the industry likely needs more oversight than it has now. Nevertheless, the market has become a potent tool for the consumer rights movement. While the personal injury market has its flaws, it remains a powerful resource for consumers that have been harmed by businesses and other entities.[71]

Conclusion

The progression of technology will continue to make it easier for companies to spread false and misleading statements. As a consequence of the statute of limitations defense, government agencies like the CA DOJ, when operating alone, are unable to effectively and equitably discourage those corporations from spreading misinformation about their products and services. The existing equitable exceptions to the statute of limitations were designed to prevent the limitations defense from producing undesirable outcomes. However, they are unable to produce equitable results when it comes to government-led consumer fraud cases. Since equitable exceptions do not fulfill their intended purpose, government agencies like the CA DOJ should focus on stopping the fraud through injunctive relief, recover civil penalties using the theory of continuous accrual, and rely on private plaintiffs to sue companies for fraud. With this combination, corporate fraud can be discouraged without severely hampering the statute of limitations defense.

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[70] Matthew Goldstein, *As Pelvic Mesh Settlements Near $8 Billion, Women Question Lawyers' Fees*, N.Y. Times (Feb. 1, 2019), https://www.nytimes.com/2019/02/01/business/pelvic-mesh-settlements-lawyers.html

[71] Slade, *supra* at https://www.nytimes.com/1988/09/09/us/the-law-personal-injury-lawyer-new-era-new-image.html