

Technology and the Law Update

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Price Scanner Accuracy Can Help You Avoid Significant Civil and Criminal Penalties

Electronic checkout scanners are in use virtually everywhere. For retailers, the use of electronic scanners increases check-out productivity and provides an electronic inventory system that leads to several efficiencies. Of course, as with many technologies, new and old, errors are inevitable. Companies know that putting items on "sale" increases sales. With thousands of items going on sale, with frequent price changes, and with efforts to keep labor costs low, scanners may not always reflect the correct price of merchandise.

Unfortunately, these scanning errors – even if innocently made – can lead to substantial civil and criminal penalties. The Weights & Measures Departments of counties throughout the state have inspectors who routinely work full-time conducting undercover shopping investigations to insure that consumers are charged the advertised, posted or quoted price. If the scanners do not reflect the correct price, the Weights & Measures Department cites merchants and their managers for civil or criminal violations. Los Angeles County currently has 17 such investigators and San Diego County recently increased its per-

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Scanning errors can result in criminal and civil liability.

mit fees to authorize the hiring of an additional inspector.

Companies are generally faced with three consequences if their scanners are found to be inaccurate: (1) an administrative civil penalty; (2) a criminal complaint; or (3) a civil complaint. The civil penalty is likely the least onerous. Under California Business and Professions Code § 12015.3, the county may impose a penalty of not more than \$1,000 for violating the statute. In addition, the imposition of a penalty under this section constitutes a complete defense to any criminal prosecution for the same acts. However, the civil penalty is "cumulative to civil remedies or penalties imposed under any other law." Thus, while the company cannot be the subject of a future criminal prosecution for the same acts, it is possible that the company may face other civil

claims (e.g., the affected consumer may still seek relief).

Rather than imposing a civil penalty, some county prosecutors file a criminal complaint against not only the company but also the store manager. The store manager is named to insure that someone appears and on the theory that the manager is responsible for assuring the accuracy of scanners. Indeed, in some cases, particularly where the store manager is paid based on total sales, the store manager has a financial incentive to overlook scanner errors. If the scanner error is a result of conduct that is "willful or grossly negligent," or if it results in an overcharge of more than one dollar, the company and store manager may be charged under the statute with a misdemeanor, "punishable by a fine of not less than \$25 nor more than \$1,000, by imprisonment in the county jail for a period not exceeding one year, or by both." However, in most, if not all, cases where criminal charges are filed, the prosecutor agrees to dismiss the charges against the store manager when the company agrees to plead guilty and pay a fine.

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The third consequence of being found guilty of a scanner error is a civil lawsuit. These lawsuits are generally filed under the theory that the company has engaged in (1) false advertising in violation of Business and Professions Code § 17500 and (2) unfair competition in violation of Business and Professions Code § 17200. The penalties in a civil lawsuit can be tremendous. For example, according to the County of San Diego Website, in April 2000, Rite-Aid was ordered to pay \$2.8 million in costs and penalties for violations of a 1998 court injunction that followed claims that Rite-Aid was charging customers more than the advertised or posted price. More recently, in early September 2003, a court ordered supermarket chain Albertson's to pay \$1.85 million to settle a civil lawsuit brought by two county prosecutors, including inspection findings from fifteen separate counties, accusing Albertson's of false advertising and unfair business practices for scanner errors.

Which of the three consequences discussed above will be pursued by the Weights & Measures Departments may depend as much on the geographical location of the store as the circumstances leading to the scanner error. For example, according to Kurt Floren, Deputy Director of the San Diego County Department of Agriculture, Weights & Measures, San Diego's "goal is to gain compliance. Administrative penalties encourage that compliance." Thus, unless there are egregious circumstances or there is a pattern of conduct, a store located in San Diego will be faced with a civil penalty of not more than \$1,000. If the same conduct occurs at a store in Los Angeles, the store and its manager will likely be defendants to a misdemeanor criminal prosecution. Floren, who used to oversee the Los Angeles program, says that filing a criminal complaint has been standard practice in Los Angeles since as early as 1980. While San Diego recently added another inspector, there are no plans to change the policy in San Diego at the present time. Where there is a pattern of conduct and the circumstances are egregious, a civil lawsuit may be the selected form of prosecution.

Negative publicity will necessarily accompany all three of the consequences discussed above. In fact, many counties post violations on their websites (e.g., San Diego <http://www.sdcounty.ca.gov/lawm/scannerviolations.html#sd9197>, Los Angeles, <http://acwm.co.la.ca.us/scripts/scaviol.htm>). Also, Los Angeles passed an ordinance in April 2002, known as the Buyer Beware Program, that requires stores convicted of charging customers prices higher than the posted price to post conviction notices at the store for 60 days. More recently, San Diego County implemented similar posting requirements mandating that stores post notice of penalties for failed inspections for 10 days.

Insuring accuracy at the checkout should be a priority for companies. The Los Angeles County Department of Weights & Measures offers a several "good pricing practices" at its website, including the following: (1) Communicate a clear policy to all personnel that accurate pricing, customer service, and fair dealing are top priorities; (2) Designate a "sale or pricing manager" responsible for ensuring that each cash register is accurately programmed to charge the current sale price; (3) Establish proce-

dures to promptly notify personnel of special sales and price changes; (4) Double check that your policy is being carried out; and (5) Establish procedures to promptly remove promotional signage and prices as soon as a sale ends. It is also recommended that stores use cash registers that display prices to customers so they can see what they are being charged. This latter suggestion is also mandated by a new law (AB 2732, Business & Professions Code §§ 13300-13302) that requires full compliance by January 1, 2007.

Insuring scanner accuracy requires diligent implementation of a sound program. If not done voluntarily, many of these "good pricing practices" may become part of a court judgment ordering a company to implement these practices, along with a significant obligation to pay a fine. With recent publicity surrounding million dollar judgments, and the risk of criminal prosecution, this is certainly an area where the price of prevention is well worth the cost of the consequences.

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Applicability of the legal principles discussed may differ substantially in individual situations. The information contained herein should not be construed as individual legal advice.