A New Theory Of Liability In Calif.

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Plaintiffs asserting claims under California's Unfair Competition Law (UCL)[1] and False Advertising Law (FAL)[2] often rely on a theory of nondisclosure: the defendant was aware of material information, the defendant failed to disclose that material information and this caused injury to the plaintiffs.

Typically, these claims are based on the allegation that the defendant failed to disclose internal documents that were not available to plaintiffs or the general public.

Recently, plaintiffs have offered a new theory of UCL/FAL liability — the defendant's alleged failure to disclose publicly available information. This article will review representative lawsuits based in whole or in part on this new theory, provide an overview of UCL/FAL based on nondisclosure and discuss the potential impact of this new theory on defendants.

Nutella Deceptive Sales and Marketing Litigation

In the Nutella case, the plaintiffs, two California residents, brought an action against Ferrero U.S.A. Inc., the manufacturer of a chocolate hazelnut spread called Nutella, alleging causes of action under the UCL and the FAL. They alleged that, in their search for nutritious breakfast alternatives, they trusted the representations made by Ferrero in its labeling Nutella, as "[a]n example of a tasty yet balanced breakfast." They believed Nutella was part of a healthy meal based in part on this representation.

The two brought a class action on behalf of themselves and "all persons … who purchased, on or after Jan. 1, 2000, one or more Nutella products in the U.S. for their own or household use rather than resale or distribution."

The complaint stated that Nutella contains dangerous levels of saturated fat. As evidence of the high levels of saturated fat, the plaintiffs cited to calorie limits promoted by the American Heart Association. The plaintiffs also described the high level of sugar — 20 grams or five tablespoons — in each serving.

As evidence of the harmful levels of artificial trans fat, the plaintiffs cited to Dietary Guidelines Advisory Committee Report, where the U.S. Department of Health and Human Services and the U.S. Department of Agriculture recognized that "[t]he relationship between trans fatty acid intake and LDL cholesterol is direct and progressive, increasing the risk of cardiovascular disease." The complaint cites various publicly available studies to emphasize the potential health risks associated with saturated fat in the diet.

The plaintiffs' complaint specifically charges Ferrero with omitting the actual content and ingredients of Nutella in advertisements and commercials (although the ingredients are listed on the label in the nutrition facts) including that it is comprised primarily of sugar and oil, and the association between these harmful ingredients as well as death, disease and other health issues like childhood obesity.

The complaint also states that "despite widely advertising that Nutella is healthy because it does not have artificial colors or preservatives, Ferrero further deceptively omits from commercials and advertisements that Nutella contains artificial flavoring (although the label lists "vanilla: an artificial flavor" in the ingredients)."

In short, the plaintiffs claim that Ferrero did not inform consumers that the high levels of saturated fats, sugar, oil, etc., could potentially harm the heart by raising blood cholesterol and blood sugar levels — information publicly available to consumers. The case is still pending in the U.S. District Court for the Southern District of California.

Richardson v. Phusion Projects

The Richardson case involves a caffeinated, alcoholic beverage called Four Loko. The plaintiff, Jacqueline Richardson, brought an action against Phusion Projects, the manufacturer and distributor of Four Loko, alleging violation of the UCL and the FAL.

The complaint states that Four Loko is a fruit-flavored beverage that contains a range of 6 to 12 percent alcohol by volume, depending on state regulations. In addition to alcohol, Four Loko also contains approximately 135 milligrams of caffeine in each can.

The complaint compares Four Loko to standard beer, which usually contains 4 to 5 percent alcohol by volume, and an 8 ounce cup of coffee, that usually contains 100-200 milligrams of caffeine. According to the complaint, on Nov. 17, 2010, the U.S. Food and Drug Administration sent Phusion a warning letter stating the "FDA is aware that, based on the publicly available literature, a number of qualified experts have concerns about the safety of caffeinated alcoholic beverages."

Citing multiple publicly available studies, the letter outlined the FDA's concern over the combination of caffeine and alcohol. The complaint also references a consumer update published by the FDA entitled "Serious Concerns Over Alcoholic Beverages with Added Caffeine," and several articles about caffeinated alcoholic beverages to support the claim that Four Loko is an unsafe product.

Richardson purchased Four Loko Fruit Punch on Aug. 20 and 21, 2010. She filed the complaint on March 4, 2011 alleging that Phusion failed to disclose the particular dangers of drinking a caffeinated beverage with high alcoholic content in any advertising, labeling, packaging, marketing, promotion and selling of the Four Loko product. Richardson seeks to represent a class comprised of purported class members who purchased Four Loko because:

"Defendant knowingly and intentionally concealed from plaintiff and members of the class material information regarding adverse health effects from the use of Four Loko."

The complaint alleges that because there was widespread publicly available information indicating that caffeinated alcoholic beverages were potentially unsafe, it created a duty under which Phusion was affirmatively required to warn consumers of the potential danger of mixing alcohol and caffeine.

There is a hearing on Phusion's motion to dismiss set for June 20, 2011.

Weeks v. Kellogg Company

In this case, the plaintiffs brought an action against the Kellogg Co. alleging violations of both the UCL and the FAL. They charged the defendants with making false and misleading statements in their advertising and packaging about Kellogg's Cocoa Krispies and Rice Krispies.

According to the plaintiffs' complaint, the defendants embarked on a marketing campaign to suggest both products supported immunity, contained "25 percent daily value of antioxidants and nutrients," and contained vitamins A, B, C and E.

Based on the advertising campaign, the plaintiffs charge Kellogg with failure to adequately disclose "other" products, such as sugar, chocolate, high-fructose corn syrup and/or partially-hydrogenated oils and "whether inclusion of certain ingredients outweighs the benefits of the immunity cereals, and render the 'immunity' claims false and misleading."

This case is just one example of many where California courts allowed a plaintiff to proceed under a UCL or FAL claim, despite the fact that the allegedly undisclosed information was on the product label at the time the consumer purchased the product.

The case settled before a hearing on plaintiffs' Motion for Class Certification.

Yumul v. Natural Balance Inc.

The plaintiff, Rebecca Yumul, brought an action under the FAL and the UCL against Natural Balance Inc. alleging that Nucoa Real Margarine (Nucoa), a product distributed by Smart Balance, contains artificial trans fat, which raises the risk of coronary heart disease more than any known nutritive product.

The plaintiff claimed she purchased a package of Nucoa approximately every two weeks and that, in the aggregate, she purchased Nucoa 200 to 300 times between Jan. 1, 2000 and Jan. 24, 2010.

The plaintiff's complaint is premised on the theory that Nucoa contains artificial trans fat, which raises the risk of coronary heart disease by raising the level of LDL ("bad") cholesterol and lowering the level of HDL ("good") cholesterol. She claims that trans fat causes cancer and Type 2 diabetes.

Despite these negative effects of trans fat, the plaintiff claimed that Nucoa packages misleadingly bore the label "No Cholesterol" or "Cholesterol Free," in violation of the FAL and the UCL. Although this statement might be literally true, the plaintiff argued that it was misleading because consumption of Nucoa could allegedly raise the level of LDL blood cholesterol.

In support of the allegations that trans fat is harmful to health, the plaintiff cites to various articles, including a Newsweek article "The Skinny on Bad Fat," published in 2003, an article published in the San Francisco Chronicle, Dietary Guidelines published by HHS and the USDA and a publication by the American Heart Association "Trans Fat Overview."

The plaintiff also relies on "Questions & Answers About Trans Fat Nutrition Labeling" by the Center for Food Safety & Applied Nutrition and U.S. Food & Drug Administration.

Natural Balance filed a motion to dismiss the plaintiff's complaint, which the court granted without prejudice. The court has subsequently granted, in part, Natural Balance's motions to dismiss the plaintiff's amended complaint, first amended complaint, and second amended complaint. Natural Balance's motion to strike the third amended complaint is pending.

UCL/FAL Law and Nondisclosure

The basic elements of a UCL/FAL claim are well-known. The UCL prohibits "unfair competition," defined as "any unlawful, unfair or fraudulent" acts or practices, as well as false advertising. "Unfair competition" is defined as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the FAL]." Thus, to establish a violation of the UCL, a plaintiff "must establish that the practice is either unlawful (i.e., forbidden by law), unfair (i.e., harm to victim outweighs any benefit) or fraudulent (i.e., likely to deceive members of the public)."[3]

To establish a violation of the FAL, a plaintiff must prove that the defendant disseminated false or misleading advertising including advertisements that, although true, are either actually misleading or have a likelihood to deceive or confuse the public.

To state a claim for fraud based on nondisclosure, a plaintiff must allege 1) the defendant failed to disclose a material fact that he knew or believed to be true; and 2) the defendant had a duty to disclose that fact.

A duty to disclose arises when the material fact is known to (or accessible only to) the defendant; and the defendant knows the plaintiff is unaware of the fact and cannot reasonably discover the undisclosed fact.

Nondisclosure constitutes a fraud under the FAL or the "fraudulent" prong of the UCL only when there is a duty to disclose. The California Supreme Court recognized this rule long ago in the context of FAL and UCL claims:

"Some of the representations may constitute nonactionable expressions of opinion; likewise some nondisclosures may involve matters which defendants had no duty to disclose."[4] The California Court of Appeal has explained: "A failure to disclose a fact that one has no affirmative duty to disclose is not "likely to deceive" anyone within the meaning of the UCL."[5]

Future Impact

Whether this new theory of liability survives will depend on how courts frame the case. If courts agree with defendants, and view these as nondisclosure cases, then courts will likely dismiss these claims at the pleading stage based on the failure to establish a duty to disclose.

On the other hand, if courts agree with plaintiffs, and believe that UCL/FAL claims based on nondisclosure of publicly available information are affirmative misrepresentation cases, then plaintiffs will continue to assert this theory.

In practice, required disclosure of publicly available information creates a slew of perplexing issues. Courts will be left to wrestle with the question of where to draw the line between actionable and nonactionable conduct. If courts make manufacturers responsible for providing all safety information, including publicly available information, the scope of the duty could become infinite.

For example, would a radio manufacturer be required to warn consumers about a maximum decibel level or fast food makers required to inform consumers about health concerns associated with high calorie levels? Both California and federal courts have expressly rejected a "least sophisticated consumer standard" in the context of FAL or UCL claims as the standard.

It would be difficult for courts to reconcile a duty to warn about all publicly known information with California's express rejection of the "least sophisticated consumer standard."

Furthermore, if a manufacturer is responsible for informing consumers about publicly available information, would a manufacturer then be responsible for validating or substantiating publicly available information? If the information disseminated by the manufacturer, originated from an independent source, proved to be incorrect, would the manufacturer become liable for distributing false information?

It remains to be seen how the courts will address this new approach to the FAL and UCL. Until then, the duty to warn about publicly available information will continue to weigh heavy over manufacturers' heads.

Endnotes:

[1] Cal. Bus. & Prof. Code § 17200 et seq.

[2] Cal. Bus. & Prof. Code § 17500 et seq.

[3] Albillo v. Intermodal Container Servs. Inc., 114 Cal. App. 4th 190, 206 (2003).

[4] Committee on Children's Television Inc. v. General Foods Corp., 35 Cal. 3d 197, 213 n.15, 197 Cal. Rptr. 783, 793 n.15 (1983).

[5] Berryman, 152 Cal. App. 4th at 1556–57, 62 Cal. Rptr. 3d at 188 (discussing Daugherty v. Am. Honda Motor Co., 144 Cal. App. 4th 824, 838, 51 Cal. Rptr. 3d 118, 128 (2006)).

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