Legal Backgrounder

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IS WATER PRODUCT'S MARKETING ILLEGALLY "UNFAIR" UNDER CALIFORNIA LAW?

by

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On January 14, 2009, the Center for Science in the Public Interest ("CSPI") filed a class action complaint against the Coca-Cola Company on behalf of all California residents who purchased Glaceau VitaminWater, a "nutrient enhanced water beverage" sold by a wholly owned subsidiary of Coca-Cola. The case, *Koh v. The Coca-Cola Company, et. al.*, USDC Northern District Case No. CV 09-0182 VRW, is pending in San Francisco federal court before Judge Vaughn Walker.

The lawsuit alleges that VitaminWater is marketed as a "healthy beverage" and a "healthy alternative to soft drinks." The complaint focuses on VitaminWater's labels and accuses it of having a "healthful-sounding name" when it is "sugar water – just like soft drinks – with a few added vitamins." Plaintiffs do not dispute that the quantity of sugar on bottles of VitaminWater is printed on the nutritional information label. Nevertheless, because the other healthy-sounding words on its label "draw consumer attention away from the significant amount of sugar in the product," the complaint accuses Coca-Cola of false advertising in violation of California's Unfair Competition Law, Business & Professions Code § 17200 ("section 17200"), Business and Professions Code § 17500, and the Consumer Legal Remedies Act, Civil Code § 1750.* Plaintiffs also assert common law claims of fraud and unjust enrichment.

Lawsuits alleging violations of section 17200 have been popular over the past several years, particularly with respect to product labeling in the food and beverage industry. Kraft received significant media attention in 2006 when it was sued for false advertising of its guacamole dip under section 17200. The plaintiffs in that case, arguing that guacamole should be "mostly" avocado, claimed that buyers of Kraft's dip were deceived because it did not contain enough avocado. *Lifsey v. Kraft*

*The requirements for liability under Business & Professions Code § 17500 and the Consumer Legal Remedies Act are largely duplicative of section 17200, at least with respect to false advertising claims, and generally focus on whether the advertisement would deceive a reasonable consumer. *Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1358, 1360 (2003). For the sake of simplicity, the remainder of this article focuses on the application of section 17200.

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Foods Global, Inc., LASC Case No. BC 362633. A copycat lawsuit making substantially the same claims was filed a few months later against Ventura Foods and Dean Food Company regarding their popular Zesty Guacamole brand dip. *David Bienstock, et. al., v. Ventura Foods, Inc., and Dean Foods Company*, LASC Case No. BC362937. False advertising complaints based on section 17200 have also been brought against Kellogg and Pepsi for their "Froot Loops" and "Captain Crunch Berries" breakfast cereals due to the lack of, respectively, "fruit" and "berries" in the cereals. *Mark C. McKinnis v. Kellogg USA*, USDC Central District Case No. CV 07-2611 ABC (RCx) and *Mark C. McKinniss v. PepsiCo, Inc.*, USDC Central District Case No. CV 07-2609 FJW (MANx). Gerber is currently defending another case brought by CSPI involving whether the advertising for its "Fruit Snacks" toddlers drink violated section 17200 because it was made primarily with grape concentrate and not, as the label suggests, fruit juice. *Williams v. Gerber Prods. Co.*, 552 F.3d 934 (9th Cir. 2008).

To prevail on a section 17200 claim, a plaintiff must prove that a defendant engaged in an unlawful *or* fraudulent *or* unfair business act. Following legislation passed in 2004, a person bringing an action for relief under section 17200 must have suffered "injury in fact" and "lost money or property as a result of such unfair competition." *Uyeda v. J.A. Cambece Law Office, P.C.*, 2005 WL 1168421, *5 (N.D. Cal. 2005) ("the California electorate voted in favor of Proposition 64, which amended the UCL such that a private plaintiff would have standing only if he 'has suffered injury in fact and has lost money or property as a result.'"). Recently, California courts held that a consumer has not suffered "injury in fact" and has not "lost money or property" if the consumer receives what he or she paid for, even if the person is unsatisfied with the product. Assuming that plaintiffs prove injury in fact, they still must demonstrate that Coke engaged in activity that was either *unlawful*, *fraudulent*, or *unfair* in order to prevail on a section 17200 claim.

The Unfair Prong. 'Unfair' conduct is that which threatens a violation of an antitrust law, or violates the policy or spirit of one of those laws or otherwise significantly threatens or harms competition. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 185-187 (1999). A consumer seeking recovery for an "unfair" business practice must allege and prove that: (1) the consumer injury was substantial; (2) the injury is not outweighed by any countervailing benefits to consumers or competition; and (3) the injury is one that consumers themselves could not reasonably have avoided. *Camacho v. Automobile Club of Southern California*, 142 Cal. App. 4th 1394, 1403 (2006).

The Unlawful Prong. An unlawful business practice is an act performed during a business activity that is forbidden by law, whether civil or criminal, federal, state or municipal. *Klein v. Nature's Recipes, Inc.*, 59 Cal. App. 4th 965, 969 (1997). Section 17200's "unlawful" prong borrows violations of other laws and treats them as independently actionable unlawful practices. *State Farm Fire & Cas. Co. v. Superior Court*, 45 Cal. App. 4th 1093, 1103 (1996).

The Fraudulent Prong. Section 17200's "fraudulent" prong requires a false statement or advertisement that is likely to deceive a reasonable consumer. *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995) (applying reasonable consumer test to section 17200's fraud claim); *Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1358, 1360 (2003) (applying reasonable consumer test to claims under section 17200's fraudulent prong, section 17500 and the Consumer Legal Remedies Act). The term "likely" means *probable*, not just possible. *Freeman*, 68 F.3d at 289. If the alleged misrepresentation is such that no reasonable consumer would be misled, then there is no liability

under section 17200. *Haskell v. Time, Inc*., 857 F. Supp. 1392, 1399 (E.D. Cal. 1994).

So is Coca-Cola liable under section 17200 because of its sale of VitaminWater? Probably not. Predicting how litigation will unfold is fraught with uncertainty, but plaintiffs must overcome several major obstacles in order to recover.

Injury in Fact. The plaintiffs suing Coca-Cola face an uphill battle on showing "injury in fact" from their purchase of VitaminWater. Unlike the section 17200 cases involving guacamole, fruit juice, or even Captain Crunch Berries, where the false advertising claim arose from accusations that the product *lacked* an ingredient mentioned on or implied by the label, the complaint against VitaminWater centers on the healthy *sounding* words on the label such as "power-c," "balance," "focus," "revive," endurance," and "multi-v" that, according to plaintiffs, *imply* health benefits. The complaint admits that VitaminWater contains vitamins, but contends that the beverage nevertheless harms consumers' health because "VitaminWater is loaded with sugar," and refers to scientific studies concluding that diets high in added sugars contribute to obesity and other health issues.

However, the fact that VitaminWater contains sugar and sugar may have adverse long-term health effects may not be enough to establish injury. Recent cases suggest that 17200's injury in fact requirement is not met absent "express representations" about the makeup or origins of a product that are later revealed to be false. *See, e.g., Animal Legal Defense Fund v. Mendes*, 160 Cal.App.4th 136, 145-146 (2008) (suggesting in dicta that injury in fact might be established where milk was represented to be "organic, produced by non-hormonally-enhanced cows, or produced by grass-grazed cows" and the representation turned out to be untrue.) In *Mendes*, consumers claimed that they purchased milk believing that the milk-producing cows were well-treated and given adequate room for exercise, when in fact the cows were confined in cramped stalls. According to the Court, this was only a "moral injury" and did not result in "lost money or property" because they had received what they paid for – milk. *Animal Legal Defense Fund v. Mendes*, 160 Cal.App.4th 136 (2008). Similarly, Coca-Cola has a strong argument that consumers of VitaminWater suffered no injury because they received what they paid for – a vitamin-enhanced beverage.

Likely to Deceive a Reasonable Consumer. Plaintiffs must demonstrate a violation of section 17200 even if they establish injury in fact. The complaint does not allege any unlawful or unfair activity by Coca-Cola in connection with VitaminWater, so plaintiffs are left with only the third prong – fraudulent activity – to make their case. Fraud is a fact-specific inquiry of whether a reasonable person is likely to be deceived by VitaminWater's label. The question becomes: what is VitaminWater allegedly deceiving its consumers into believing? Plaintiffs could credibly argue that from its name, a reasonable person would conclude that VitaminWater contains vitamins and water. Plaintiffs, however, go well beyond this position and contend (and would have to prove) that descriptive buzzwords like "balance," "focus," or endurance" would cause a reasonable consumer to believe that VitaminWater promotes good health.

This is a much harder case to make. Decisions outside the food labeling context have held that reliance on one or a few words on a label is unreasonable as a matter of law where other, qualifying information is available from the larger context. For instance, in *Shvartz v. Budget Group*, 81 Cal. App. 4th 1153, 1158-60 (2002), the court dismissed a consumer fraud complaint because it found that the plaintiff's subjective inferences regarding rental car refueling charges was not reasonable when the

actual charges were printed in the rental agreement. Similarly, in *Freeman v. Time, Inc.*, 68 F.3d 285, 289-90 (9th Cir. 1995), the court affirmed dismissal of a complaint because the plaintiffs' belief that he had won a prize based on a solicitation letter stating in large type that he had won was unreasonable in light of qualifying language that appeared elsewhere in the materials. In *Plotkin v. Sajahtera, Inc.*, 106 Cal. App. 4th 953, 965-67 (2003), the court found, as a matter of law, that plaintiff's assumption that no additional fees would be imposed for valet service at a parking lot was unreasonable because the parking ticket disclosed that additional fees would be charged.

Despite the buzzwords on VitaminWater's label, its sugar content and other nutritional information are clearly displayed on the bottle. Convincing a judge or a jury that a "reasonable consumer" would "probably" scrutinize the small buzzwords while disregarding the nutritional label may be a hard sell.

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