Legal Backgrounder

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When Is Food "Unlawful" Or Not "Merchantable"?: Court Ruling Further Confounds Labeling Suit Defendants

by James D. Smith and Sara Ahmed

A recent magistrate judge recommendation from the U.S. District Court for the Northern District of California highlights the many difficulties and uncertainties that defendants face in food labeling class actions based on California law.

Park v. Welch Foods, Inc. On March 21, 2014, Magistrate Judge Paul Singh Grewal denied Defendant Welch Foods Inc.'s motion to strike Plaintiffs Elizabeth Park and Carolyn Otto's claims that Welch's juice labeled "no sugar added" and Welch's fruit spread labeled "all natural" were "illegal." The order also denied Defendant's motion to dismiss the seventh cause of action for implied breach of warranty of merchantability.[1]

Plaintiffs' Third Amended Complaint ("TAC") relies on California's Unfair Competition Law ("UCL") § 17200 as well as the implied warranty of merchantability in alleging that Defendant unlawfully mislabeled its juice and fruit spread.[2] Plaintiffs contend that Welch's violates federal and California labeling standards with "no sugar added" statements because the products have too many calories per reference serving. They also allege that the "natural" labeling is improper because the products ostensibly contain artificial preservatives and flavoring. Plaintiffs' first cause of action for violating the UCL contends that Defendant's alleged act of mislabeling the products was "unlawful," thus triggering liability. Plaintiffs' seventh cause of action for breach of implied warranty of merchantability in the TAC further alleges that Plaintiffs would not have purchased Welch's juice and fruit spreads "had they known [the products] were not capable of being legally sold or held" and that Plaintiffs allegedly relied on "Defendant's implied representation that the 100 percent juices products were legal to purchase."[3] Plaintiffs assert that simply possessing the products subjected them to potential prosecution and that they could not lawfully resell the products based on the alleged erroneous labeling.[4]

The magistrate judge's order is interesting for two reasons. First, it highlights the continuing disagreement in the Northern District of California regarding claims under the "unlawful" prong of the UCL. Second, the order reaches a distressing conclusion for defendants regarding what amounts to a cognizable implied warranty of merchantability claim in food labeling cases.

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[1] *Park v. Welch Foods, Inc.*, Order, No. 5:12-cv-06449-PSG, Doc. 49 (N.D. Cal. Mar. 21, 2014).
[2] *Park v. Welch Foods, Inc.,* TAC, No. 5:12-cv-06449-PSG, Doc. 36 (N.D. Cal. Oct. 30, 2013).
[3] *Id.* at *15-16.
[4] *Id.* at *29. Cal. Health & Safety Code § 110760 states, "It is unlawful for a person to … hold or offer for sale any food that is misbranded," punishable by "not more than one year in the county jail or a fine of not more than one thousand dollars." Cal. Health & Safety Code §§ 110760, 111825.

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The "Unlawful" Prong of the UCL. The UCL provides consumers with a claim for "unlawful," "unfair," or "fraudulent" business practices. Welch's motion first sought to strike all allegations about the alleged "illegal" nature of the products due to mislabeling.[5] Plaintiffs included those references to support their UCL "unlawful" business practices claim. Defendant argued that "a claim of illegality cannot substitute for actual causation and reliance."[6] Magistrate Judge Grewal denied that request.

Northern District judges disagree about whether a plaintiff must plead actual reliance to establish standing when bringing a claim under the UCL's "unlawful" prong or whether simply alleging the "illegal" nature of a product is sufficient. Arguably, the trend seems to be to require actual reliance, but the decisions are not uniform.[7] The Ninth Circuit will need to resolve this disagreement unless the California Supreme Court provides clear guidance first.

The Breach of Implied Warranty Claim. Defendant's motion to dismiss focused exclusively on Plaintiffs' seventh cause of action for breach of implied warranty of merchantability. While Plaintiffs claim they would not have purchased the products had they known the products were not capable of being legally sold or held, Plaintiffs do not allege they relied on any statements regarding legality when buying Defendant's products, nor do they allege that the juice contained affirmative statements about the legality of its labeling.[8] Under Plaintiffs' implied warranty theory, they need not even have relied on their own subjective inference that the products were correctly labeled. Indeed, their theory does not require that Plaintiffs (1) faced any law enforcement action for possessing "illegal" products, (2) ever intended to resell the products, or (3) were not able to consume the products. Every indication is that these Plaintiffs and their families consumed and enjoyed the products.

Nonetheless, the magistrate judge denied the motion to dismiss this claim. He reached that conclusion despite acknowledging that Defendant's arguments "may resonate with certain notions of common sense, [but] they do not resonate with the law as it now stands." *Park v. Welch Foods, Inc.*, Order, No. 5:12-cv-06449-PSG, Doc. 49 at *1 (Mar. 21, 2014). In sum, the decision treats buying the product as sufficient *by itself* to create a breach of implied warranty, regardless of whether the plaintiff then consumed the product without any problems or complaints. This approach improperly elevates the implied warranty to a strict liability consumer protection law.

Consumer fraud statutes, including the UCL, however, are designed to protect consumers from deceptive or fraudulent advertising. Under those statutes, the injury is the consumer's purchase of a product based on false or misleading advertising. That action alone confers standing and allows plaintiffs to state damages under those statutes in many situations. In contrast, a claim for breach of implied warranty of merchantability is designed to offer a remedy when a consumer purchases a product that lacks qualities

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[5] *Park v. Welch Foods, Inc.*, Motion to Strike and Dismiss, No. 5:12-cv-06449-PSG, Doc. 39 (N.D. Cal. Dec. 13, 2013).

[6] *Id.* at *5; *see Brazil v. Dole Food Co.,* 2013 U.S. Dist. LEXIS 136921 at *8-9 (N.D. Cal. Sept. 23, 2013) (holding that plaintiff's "illegal product" theory "fails as a basis for establishing statutory standing under the UCL").

[7] *See Gitson v. Trader Joe's Co.*, 2014 U.S. Dist. LEXIS 33936, at *26 (N.D. Cal. Mar. 14, 2014) (stating "plaintiffs must demonstrate actual reliance in order to establish standing to pursue their claims under the unlawful prong of the UCL" and clarifying the distinct nature and role of "actual reliance" versus "reasonable reliance" for the purposes of consumer fraud claims); *see also Thomas, et al. v. Costco Wholesale Corporation*, 5:12-cv-02908-EJD, Doc. 70 at *12 (N.D. Cal. Mar. 13, 2014) (finding that "under the 'unlawful' prong of the UCL, Plaintiffs must plead reliance when claims are premised on allegedly deceptive advertising"); *see also Brazil v. Dole Food Co.*, 2013 U.S. Dist. LEXIS 136921 (N.D. Cal. Sept. 23, 2013) (finding that merely purchasing an "illegal product" without actual reliance on a misrepresentation does not confer standing to bring a UCL claim); *but see, e.g., Swearingen v. Yucatan Foods, L.P.,* 2014 WL 553537 (N.D. Cal. Feb. 7, 2014). In *Swearingen*, the court held that "a plaintiff proceeding under the 'unlawful' prong need only plead facts to show it is plausible the defendant broke the law because the legislature has already determined the conduct to be 'unfair' by virtue of legislative prohibition."

[8] *Park v. Welch Foods, Inc.*, TAC, No. 5:12-cv-06449-PSG, Doc. 36 at 29 (N.D. Cal. Oct. 30, 2013).

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bargained for as part of the transaction. It is not the mere advertising that creates the injury or gives rise to the claim. Rather, it is receiving a product that is less than one bargained for that creates the injury and claim.[9] Plaintiffs, however, failed to allege that the purchased products were unfit for their ordinary purpose, *i.e.*, Plaintiffs do not allege that Welch's products could not be safely consumed.[10] Instead, Plaintiffs couch their implied warranty claim on the "unlawful" misbranding allegations from their UCL claim. Neither Plaintiffs nor the magistrate judge addresses how to reconcile the difference in pleading requirements for UCL versus implied warranty claims in this regard or how public policy or statutory interpretation could affect the treatment of these claims.

Magistrate Judge Grewal's implied warranty of merchantability rationale effectively creates a strict liability claim for consumers who simply allege they bought and possessed products that could not be legally resold due to the products being mislabeled. The claim is unrelated to the product's performance, taste, etc. In contrast, other district courts in California have determined that "challenges to package labeling which do not relate to the ordinary use and performance of the product are insufficient to support an implied warranty claim."[11] The *Welch* order does not address these points. Rather, the order cites (at n.28) to *Weinstein v. Saturn Corp.,* 303 F. App'x 424, 426 (9th Cir. 2008), for the proposition that end-of-line consumers may bring implied warranty claims. *Weinstein*, however, was not a case about mislabeled food products; it was about consumer beliefs that a car calling system (OnStar) would operate like an "ordinary" telephone (which it did not). *Id.* That situation is vastly different than a juice that the consumer drank, apparently enjoyed, and that satisfied the consumer's thirst.

The order also does not effectively address the notion of proximate cause or damages in an implied warranty claim.[12] Plaintiffs do not allege that they purchased products with the intent of reselling them but then could not do so.[13] Plaintiffs likewise do not contend that they purchased products that were unusable and not fit for consumption. Rather, Plaintiffs purchased and presumably consumed the juice and natural spreads in the manner contemplated precisely for that product.[14] Thus, no loss really occurred. Proving the breach of the warranty of merchantability proximately caused injury is an essential element of Plaintiffs' claim, but the decision effectively excuses Plaintiffs from pleading it.

Conclusion. While this decision highlights the need for clarification regarding the UCL's "unlawful" prong, the implied warranty analysis is more troubling. In essence, it has turned a warranty remedy designed to address situations where a consumer did not receive what she bargained for into strict liability without any showing of injury.

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[9] Cal. Com. Code § 2314

[10] *Park v. Welch Foods, Inc.*, TAC, No. 5:12-cv-06449-PSG, Doc. 36 at 21-22 (N. D. Cal. Oct. 30, 2013).

[11] *Park v. Welch Foods, Inc.* Defendant's Reply, No. 5:12-cv-06449-PSG, Doc. 44 at 10 (Feb. 14, 2014); *Rossi v. Whirlpool Corp.,* No. 2:12-cv-00125, 2013 WL 5781673, at *6-7 (E.D. Cal. Oct. 25, 2013) (stating that "even though a product may be labeled with specific adjectives, that description does not change the ordinary purpose that it is used for"); *Viggiano v. Hansen Natural Corp.,* No. CV 12-10747 MMM JCGX, 2013 WL 2005430, at *12-13 (C.D. Cal. May 13, 2013) (finding that soda marketed as "premium" with "all natural flavors" was not unmerchantable because it still fit its ordinary purpose of consumption).

[12] *See, e.g.*, Uniform Commercial Code Official Text and Comments (2013-2014 ed.) § 2-314 cmt. 13 ("it is of course necessary to show . . . that the breach of the warranty was the proximate cause of the loss sustained").

[13] Indeed, Plaintiffs' theory curiously would recognize a claim even if they intended to resell the products and in fact resold all of them for their desired price. According to Plaintiffs, merely temporarily possessing the "mislabeled" products injured them. This theory cannot satisfy any coherent proximate cause analysis under the U.C.C.

[14] *Park v. Welch Foods, Inc.,* TAC, No. 5:12-cv-06449-PSG, Doc. 36 at 16-17 (N.D. Cal. Oct. 30, 2013).

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