Legal Backgrounder

Vol. 31 No. 18 July 29, 2016

Washington Legal Foundation
Advocate for Freedom and Justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

In California, the "Reasonable Person" Still Helps Consumer Class-Action Defendants

by Rick L. Shackelford

No litigation foot soldier has been conscripted more often than the "reasonable person" in defining false advertising and unfair competition under California law. With the recent gusher of consumer class actions in California, it is appropriate to ask: Has the reasonable person become more intelligent, more educated, or more tech savvy over time? Or has the reasonable person been dumbed down, become less capable of self-protection, more trusting, and more in need of judicial paternalism?

In California, the reasonable person has proven quite resilient. Although his or her specific characteristics have evolved, the reasonable person provides an objective standard for assessing permissible competitive conduct and advertising claims. Far from being defenseless against the wiles of marketers and advertisers, the reasonable person is not gullible enough to fall for anything.

California unfair-competition jurisprudence dates back to 1895. The focus was on protecting competition, not competitors, and certainly not consumers. The law of "unfair competition" principally applied to one "passing off" his goods as those of another. The key in early cases was evidence of actual deception. The courts did not call upon the reasonable person in order to hypothesize about what actual persons might do.

Civil Code § 3369

In 1933, the California legislature amended and expanded Civil Code § 3369 to cover "unfair" competition and "misleading advertising." The primary concern remained preventing businesses from being harmed, but courts recognized that the amended statute also aimed to protect the general public. *Am. Philatelic Soc. v. Claibourne,* 3 Cal. 2d 689 (1935). Over time, courts addressed conduct likely to cause confusion among consumers, even when no direct competitive interests were at stake. Thus, in *Academy of Motion Picture Arts & Sciences v. Beeson*, 15 Cal. 2d 685 (1940), the Motion Picture Academy sued a Hollywood acting school called "The Hollywood Motion Picture Academy." The parties did not "compete," and the court specifically noted that "[b]y the use of the name Hollywood Motion Picture Academy the defendant does not take away from the plaintiff and draw to herself any business the plaintiff would otherwise receive." *Id*. at 688-89. Nonetheless, the court noted that injunctive relief could be appropriate if plaintiff could show that the similarity in names "would be likely to deceive or mislead an ordinary unsuspecting customer[.]" *Id.* at 692 (quotation omitted).

This principle was echoed in *Jackman v. Jack A. Mau*, 78 Cal. App. 2d 234 (1947). Plaintiff had long used the name "Jackman of Hollywood" to market and sell clothing. The defendant opened in a different part of town under the name of "Jackmau of Hollywood." The likelihood of confusion appears obvious enough, but the

---

Rick L. Shackelford is a Shareholder with Greenberg Traurig, LLP in its Los Angeles, CA office. The author acknowledges Mike Neighbors, a 2016 summer associate at the firm, for his contribution to this Legal Backgrounder.

plaintiff also produced evidence from consumers who had entered defendant's store and asked for plaintiff's goods by name. Similarly, the defendant admitted that other consumers had mistaken his store for Jackman of Hollywood. On this record, the court held the trial court had erred in failing to enjoin the offending conduct and remanded for a new trial.

In 1962, a plaintiff invoked the reasonable person in an unfair competition case to protect the interests of the general consuming public. In *People ex rel. Mosk v. National Research Co.*, 201 Cal. App. 2d 765 (1962), the court noted that "changing standards of commercial morality" justified applying Civil Code § 3369 to protect consumers. The conduct at issue was reprehensible. The defendant created official-looking forms for collection agencies, which mailed them to debtors' last-known addresses. Many unsuspecting consumers completed and returned the forms, supplying information like current address, Social Security Numbers and driver's license numbers. The attorney general sued to enjoin the conduct. Because the defendant did not compete with consumers or the state, traditional concepts of unfair competition would not support the claim. The court gave short shrift to tradition, stating "... the current trend is to redefine the action as one against unfair business practices, rather than unfair competition, and, as a general rule, competition is not regarded as a necessary ingredient." *Id*. at 770-71 (quotation omitted). With that impediment set aside, the court held that the test for unfair competition should be "whether the public is likely to be deceived." *Id*. at 772.

Direct challenges by consumers, however, got off to a surprisingly late start. The earliest reported decision in California involving a class action seeking to enjoin an unlawful business practice is *Diaz v. Kay-Dix Ranch*, 9 Cal. App. 3d 588 (1970). That case involved a complaint on behalf of migratory farm workers challenging the practices of land owners employing persons in the country illegally, which drove down wages and negatively affected working conditions for persons who were legally eligible to work. This was obviously a challenge to allegedly unfair business practices, but not by competitors. The trial court sustained defendants' demurrer and the court of appeals affirmed, holding that the federal government's comprehensive treatment of immigration was more appropriate for addressing plaintiffs' claims.

Nevertheless, a milestone had been reached, and courts soon recognized that consumers could invoke California's unfair competition statute to challenge business practices allegedly harming them. Thus, in *Barquis v. Merchants Collection Assn. of Oakland*, 7 Cal. 3d 94 (1972), the California Supreme Court cited *Diaz* with approval and held that consumers could sue on their own behalf for injunctive relief. The court stated:

> We conclude that in a society which enlists a variety of psychological and advertising stimulants to induce the consumption of goods, consumers, rather than competitors, need the greatest protection from sharp business practices. Given the terms of the section, the purpose of the enactment and the controlling precedent, we reject defendant's suggested limitation of § 3369 to 'anti-competitive' business practices.

7 Cal. 3d at 111 (citation omitted).

The first case upholding a consumer's reliance upon the reasonable person was *Chern v. Bank of America*, 15 Cal. 3d 866 (1976). There a consumer challenged the bank's quotation of per-annum interest rates on a 360-day year, rather than 365, as deceptive. Gertrude Chern was an unlikely standard bearer for this cause. She had previously sued another bank on the same legal theory. That claim had been dismissed on summary judgment, so she could not claim she was deceived or misled when Bank of America employed the practice.

Indeed, Ms. Chern did not claim otherwise. As the court noted, she "did not dispute the fact that she knew and understood defendant's method of calculation before she executed the note in question." 15 Cal. 3d. at 873. If her claim were to survive, it would have to depend upon the reasonable person. It did. In reversing summary judgment dismissing her false advertising claim, the California Supreme Court stated: "Under this section [Business & Prof. Code § 17500], a statement is false or misleading if members of the public are likely to

be deceived. Intent of the disseminator and knowledge of the customer are both irrelevant." *Id*. at 876. Thus, the reasonable person rescued a consumer *uniquely incapable of being deceived* by the conduct she challenged.

Will the Reasonable Person Please Stand Up?

California courts have adopted the Federal Trade Commission Act's definition of a reasonable consumer acting reasonably in the circumstances.[1] *See Hill v. Roll International Corp.,* 195 Cal. App. 4th 1295, 1304 (2011). California's "reasonable person" is not the "least sophisticated consumer." *Lavie v. Procter & Gamble Co.,* 105 Cal. App. 4th 496, 504 (2003). Nor is California's reasonable consumer "exceptionally acute or sophisticated." *Id*. at 509-510.

California's courts have placed greater confidence in the "reasonable consumer" than other states or, for that matter, other branches of California government. For example, the "reasonable person" under New York's false advertising law has been described as "the ignorant, the unthinking and the credulous who, in making purchases, [does] not stop to analyze, but [is] governed by appearances and general impressions." *Guggenheimer v. Ginzberg*, 43 N.Y.2d 268, 401 N.Y. S.2d 182 (1977). In *Lavie v. Procter & Gamble*, the California Attorney General urged the court to adopt a "least sophisticated consumer" standard, because (i) California's false advertising law had always protected the general public (and therefore, by definition, the "unwary, unsophisticated and gullible"), and (ii) the reasonable person standard imposes a burden on consumers to investigate the merits of advertising claims. 105 Cal. App. 4th at 504. The court rejected both arguments, noting that the Federal Trade Commission's interpretation of the reasonable person is "more than ordinarily persuasive." *Id*. at 507 (quoting *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 186 (1999)).

California courts recognize that the reasonable person does not necessarily live alone, however. Thus, different standards apply to advertising specifically directed at children. *Comm. on Children's Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197 (1983) (applying a "particularly susceptible and naïve audience" standard). The same is true for advertising aimed at the poor and unsophisticated. *Brockey v. Moore*, 107 Cal. App. 4th 86, 101 (2003). Other courts have suggested a lower standard might apply to advertising aimed at "particularly gullible" consumers. *Freeman v. Time, Inc.*¸ 68 F.3d 285, 289 (9th Cir. 1995).

These lower standards do not dumb down the reasonable person standard. Rather, they are better understood as addressing a matter of proof; if the plaintiff can show that the practices or advertising were intentionally directed to a more vulnerable audience, then the plaintiff will stand a better chance of being permitted to present evidence that members of that audience were actually deceived, instead of relying on a "likely to deceive" standard. *Brockey v. Moore*, 107 Cal. App. 4th at 101 (targeted audience was actually deceived).

Legal Test or Screening Mechanism?

Early on, courts recognized that the "likely to deceive a reasonable person" test was a fact-based inquiry. *E.g.*, *Schwartz v. Slenderella Sys. of California*, 43 Cal. 2d 107, 112-13 (1954) (likelihood of confusion is a fact issue). As consumers have filed more false advertising cases in recent years, courts have been more willing to apply an objective standard and dismiss cases as a matter of law at the pleading stage. So many cases are filed each year that it is not possible in the space available to identify any trends, but here are some examples of arguments that produced early dismissals:

"Read the whole ad." Courts do not permit plaintiff to pick apart ads and base a claim only on bits and pieces. Rather, courts view advertisements as a whole. *Shvarts v. Budget Group, Inc.*, 81 Cal. App. 4th 1153, 1159-60 (2000) (dismissing case where rental agreement as a whole made challenged statements unlikely to deceive).

[1] [Ed. Note: For a discussion of the relevant section of the Federal Trade Commission Act, *see* William Kolasky, *'Unfair Methods of Competition': The Legislative Intent Underlying Section 5 of the FTC Act*, WLF Working Paper, Dec. 2014, *available at* http://www.wlf.org/upload/legalstudies/workingpaper/KolaskyFinalWP.pdf.]

ISBN 1056 3059

"Understand Plain Language." Advertising is designed to influence behavior, but courts will not twist the language to make an ad say things it plainly does not say. Statements like "you may already be a winner" by definition also mean "you may not be a winner," and the word "may" will not be twisted into "are" to permit a claim to go forward. Rather, such statements are non-actionable puffery that no reasonable person would interpret as meaning they had won the advertised prize. *Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1401 (E.D. Cal. 1994).

"No One Could Actually Believe That." The reasonable person has not been dumbed down over the years, but not for lack of trying by the class-action plaintiffs' bar. Especially in the food-and-beverage space, consumers have claimed they believed things like: (i) Cap'n Crunch Crunch Berries® and Froot Loops® breakfast cereals contain real fruit; (ii) a green water drop on a label means the product is environmentally conscious; (iii) vegetable crackers are primarily made of fresh vegetables; and (iv) ice cream described as "classic" and "based on a 1928 recipe" is more healthy or nutritious than other ice creams.[2] Each of these claims was dismissed on the ground that no reasonable person would believe such far-fetched things.

"You weren't born yesterday." Courts evaluate the reasonable consumer in light of ordinary knowledge and experience. Thus, in *Ebner v. Fresh, Inc.,* 818 F.3d 799 (9th Cir. 2016), the Ninth Circuit affirmed a judgment granting a motion to dismiss. This case involved a lip balm product. The plaintiff claimed the packaging was deceptive because, by design, a portion of the product could not be accessed. Thus, the consumers could never use the full declared weight of the product without resorting to digging it out somehow.

The Ninth Circuit applied the reasonable-person standard, but with a twist. Similar lip balm products are "commonplace," so reasonable consumers would not expect the entire declared weight of the product to be accessible: some portion would have to anchor the product in place. *Ebner,* 818 F.3d at 806-07. The "commonplace" package design drove the court's analysis: "the consumer's knowledge that some additional product lies below the tube's opening is sufficient to dispel any deception[.]" *Id*. at 807. The court's view of the package design effectively rendered it not deceptive as a matter of law, nor did it equate to slack fill. As the court put it, "[t]his cannot constitute 'slack-fill' because under the plain language of the statute, slack fill means the portion of the container *without* product, *i.e.*, empty space." *Ibid*. Filled space is, by definition, not empty, *even if the product filling that space is not accessible* when the package is used as intended.

Conclusion

In sum, the reasonable person is alive and well in California, and can still be called upon to repel dubious claims of deceptive business practices and advertising. This battle-tested foot soldier has not grown more gullible or credulous with time. His role has evolved from protecting competition to looking out for consumers. But in a world of crowded litigation dockets, overtaxed judicial resources, and increasingly improbable legal theories, the most important role of the reasonable person may be standing guard to prevent meritless claims from going forward. In a state-law litigation environment where deception claims grow ever more fanciful, courts want him on that wall, need him on that wall—and should keep him on that wall.

[2] *See Sugawara v. PepsiCo, Inc.*, 2009 U.S. Dist. Lexis 43127 (E.D. Cal. 2009) (no reasonable person would believe Crunch Berries are real fruit); *Videtto v. Kellogg USA*, 2009 U.S. Dist. Lexis 43114 (E.D. Cal. 2009) (no reasonable person would believe "Froot Loops" cereal contains real fruit); *Hill v. Roll Int'l Corp.*, 195 Cal. App. 4th 1295 (2011) (defendant's made up green water drop logo not indicative of any environmental significance); *Red v. Kraft Foods, Inc*., 2012 U.S. Dist. Lexis 164461 (C.D. Cal. 2012) (reasonable person knows crackers are not made primarily of fresh vegetables); *Carrea v. Dreyer's Grand Ice Cream, Inc*., 2011 U.S. Dist. Lexis 6371 (N.D. Cal. 2011) (reasonable person would not believe ice cream products described as original or classic are more wholesome), *aff'd* 475 Fed. Appx. 113 (9th Cir. 2012).

  ISBN 1056 3059