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Federal Courts In California Split Over Standing To Sue For "Unlawful" Food Labeling

by William H. Dance

California provides an attractive venue for food-labeling class action plaintiffs because of its Sherman Law and Unfair Competition Law (UCL). Through the Sherman Law, California adopts by incorporation the federal food labeling regulatory scheme. The UCL, under its three prongs prohibiting "unlawful, unfair or fraudulent" business practices, permits private rights of action based on violations of other laws. So despite the fact that federal law does not allow private actions to enforce Food and Drug Administration (FDA) regulations, courts have held (over the protest of defendants) that California effectively provides an indirect private right of action for violations of federal food labeling regulations.

A schism has developed recently among U.S. District Judges in the Northern District of California concerning the requirements for stating a claim and achieving standing under the UCL's "unlawful" prong for allegations that food labels do not conform to FDA regulations. Some courts view these allegations as necessarily sounding in fraud; others do not. This distinction can affect defendants' success in dismissing these suits at an early stage, when litigation expenses are modest relative to what they can become during discovery and summary judgment/class certification motion practice.

California's UCL was amended by Proposition 64 in 2004. Previously, any state resident could sue on behalf of the general public without an actual injury. Proposition 64 required plaintiffs to demonstrate actual reliance on a defendant's statement and injury-in-fact. In two seminal opinions interpreting Proposition 64, known informally as *Tobacco II*[1] and *Kwikset*,[2] the California Supreme Court ruled that to state a claim and achieve standing under any prong of the UCL if that claim sounds in fraud, a plaintiff must specify the deceptive representation, the nature of the reliance, and the particular injury-in-fact sustained as a result.

California federal courts have typically applied these standing requirements to food labeling cases brought under any of the three prongs of the UCL, concluding plaintiffs' claims sound in fraud whether plaintiffs alleged regulatory breaches or unregulated misrepresentations.

Recently, though, some Northern District judges have embraced the view that UCL "unlawful" claims for regulatory labeling violations can exist separately from claims sounding in fraud. It is far easier for a plaintiff to plead the mere purchase of a product with a label that fails to conform to FDA regulations than to plead the specific details of a deceptive label representation, the nature of the plaintiff's reliance, and his or her particularized injury, as is required for UCL fraud-based claims, which must also meet Federal Rule of Civil Procedure 9(b)'s heightened pleading standards when the suit is in federal court.

The most recent example of this non-fraud-based approach is *Swearingen v. Yucatan Foods, L.P.*, 2014 WL 553537 (N.D. Cal. Feb. 7, 2014),decided by U.S. District Judge Richard Seeborg. In *Swearingen*, plaintiffs brought just one cause of action, violation of the UCL's "unlawful" prong. Their complaint alleged that

> [t]he unlawful sale of misbranded food products that are illegal to sell or possess – standing alone without any allegations of deception by Defendant other than the implicit misrepresentation that its products are legal to sell or possess, or any review or reliance on the particular labeling

[1] *In re Tobacco II Cases*, 46 Cal. 4th 298 (Cal. 2009).

[2] *Kwikset Corp. v. Superior Ct.*, 51 Cal. 4th 310 (Cal. 2011).

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> claims by Plaintiffs – gives rise to Plaintiffs' cause of action under the UCL…. All Plaintiffs need to show is that they bought an unlawful product that they would not have purchased absent the Defendant's failure to disclose the material fact that the product was unlawful to sell or possess. Therefore, this claim does not sound in fraud; instead, it alleges strict liability pursuant to the [FDA regulatory] provisions of the federal law and Sherman Law.

Swearingen v. Yucatan Foods, L.P. Complaint, 3:13-cv-03544, Document 1 at 8 (July 31, 2013).

Judge Seeborg agreed, ruling that plaintiffs "need not allege deception to proceed with this [UCL unlawful] claim,"*id*., and denied the motion to dismiss. In doing so, he cited two recent decisions by his Northern District colleague, U.S. District Judge William Orrick (*Morgan v. Wallaby Yogurt Co.* and *Gitson v. Trader Joe's Co.*),[3] for the proposition 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." *Swearingen,* 2014 WL 553537 at *6.

Though several Northern District decisions have allowed plaintiffs to proceed under this strict liability UCL unlawful theory, others have dismissed it in forceful terms. In the last few months alone, U.S. District Judge Samuel Conti in *Wilson v. Frito-Lay N. Am., Inc.*, 2013 WL 5777920 (N.D. Cal. Oct. 24, 2013), U.S. District Judge Lucy Koh in *Kane v. Chobani, Inc.*, 2014 WL 657300 (N.D. Cal. Feb. 20, 2014), and U.S. District Judge Susan Illston in *Figy v. Amy's Kitchen, Inc.*, 2013 WL 6169503 (N.D. Cal. Nov. 25, 2013), all dismissed UCL unlawful claims brought by the same firm that brought the *Swearingen*, *Morgan*, and *Gitson* cases.

First, Judge Conti stated "[P]laintiffs contend that their misbranding theory is not grounded in misrepresentation or deception, but the Court finds otherwise. It is clear from Plaintiffs' [complaint] that the behavior Plaintiffs allege violated FDA regulations and the Sherman Law is misrepresentation or deception . . . ." *Wilson*, 2013 WL 5777920 at *7 (N.D. Cal. Oct. 24, 2013). He also said, citing *Kwikset*, that plaintiffs' standing theory, if allowed to prevail, would be "an invitation to shakedown suits." *Id*.

In her ruling, Judge Koh rejected plaintiffs' reliance on *Morgan*, *Swearingen*, and *Gitson* "because these cases do not discuss the impact of Proposition 64 and *Kwikset* on the standing requirements under the UCL, and thus do not address clear California Supreme Court authority on this point." *Kane*, 2014 WL 657300 at *6. Her view was that acceptance of plaintiffs' illegal product standing theory "would eviscerate the enhanced standing requirements imposed by Proposition 64 and the California Supreme Court's decision in *Kwikset*." *Kane*, 2013 WL 5289253 at *9 (N.D. Cal. Sept. 19, 2013).

Judge Illston wrote, "[i]n *Kwikset*, the California Supreme Court held that the actual reliance requirement from *Tobacco II* applied to the plaintiff's UCL claim even though he alleged unlawful conduct [that] was based on a [statutory] violation . . . ." *Figy*, 2013 WL 6169503 at *3. She explained that "[b]ecause the statutes plaintiff relies on prohibit specific types of misrepresentations on food labels . . . the actual reliance requirement applies to plaintiff's claim even though it is brought under the unlawful prong of the UCL." *Id.*

A review of the briefing in these cases shows that the defendants in *Wilson, Kane,* and *Figy* vigorously challenged plaintiffs' contention that a strict liability UCL unlawful claim could even be a cognizable theory of liability in a food mislabeling case. On the other hand, Judge Seeborg pointed out that the defendant in *Swearingen* "[did] not explicitly address" the UCL standing requirement. *Swearingen*, 2014 WL 553537 at *7. Of course, whether Judge Seeborg might have ruled differently in *Swearingen* had the defendant directly attacked the viability of plaintiffs' strict liability UCL standing theory cannot be known.

Most likely, the split among Northern District judges will be resolved only when an appeal reaches the Ninth Circuit. How these arguments are framed by defendants may have a significant impact on the outcome of such an appeal. The outcome matters because, as Judge Conti said in *Wilson*, ignoring the state and federal standing rules "would invite lawsuits by all manner of plaintiffs who could simply troll grocery stores and the Internet looking for any food product that might form the basis for a class-action lawsuit. Surely that is not the point of these consumer protection laws." *Wilson*, 2013 WL 5777920 at *6.

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[3] *Morgan v. Wallaby Yogurt Co*., 3:13-cv-00269, 2013 WL 5514563 at *9 (N.D. Cal. Oct. 4, 2013) and *Gitson v. Trader Joe's Co*., No. 3:13-cv-01333, 2013 WL 5513711 at *9 (N.D. Cal. Oct. 4, 2013).

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