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False Advertising Alert April 2017

"Et tu, *Bruton*?": Ninth Circuit Revives Baby-Food Labeling Class Action, Broadens UCL Liability

Last week, the Ninth Circuit revived a class action against Gerber alleging "that labels on [its] baby food products included claims about nutrient and sugar content that were impermissible under [FDA] regulations." *Natalia Bruton v. Gerber Products Co.*, No. 15-15174 (9th Cir. April 19, 2017). In so doing, the Ninth Circuit made it easier for plaintiffs to pursue claims under the "unlawful" prong of California's Unfair Competiton Law (UCL); endorsed a novel and troubling theory of deception under the UCL's "fraudulent" prong; and lowered the evidentiary burden for plaintiffs pursuing false-advertising claims under California law.

Background

The case was filed in 2014 by a mother, Natalia Bruton, who purchased Gerber baby-food products featuring label claims such as "Excellent Source" and "Good Source" (of certain nutrients); "As Healthy As Fresh"; "No Added Sugar"; and "Supports Healthy Growth & Development." Notably, Bruton did *not* allege that any of these statements was actually false. Instead, she alleged: (1) that these claims violated certain technical FDA labeling regulations; and (2) that the presence of these true statements misleads consumers to believe that Gerber's baby food is "of a higher quality" than competing products that comply with FDA regulations by abstaining from such claims.

During discovery, Bruton proffered no survey or other extrinsic evidence to support her theory of deception. The district court granted summary judgment to Gerber, holding that, without any evidence that reasonable consumers interpreted Gerber's labels in the manner alleged, Bruton could not state a claim under any prong of the UCL. The Ninth Circuit reversed that grant of summary judgment in a decision that is noteworthy for several reasons.

No deception needed for UCL "unlawful"-prong claims

The UCL's "unlawful" prong takes violations of other statutes and regulations and makes them privately actionable as "unfair competition." In food-labeling cases, plaintiffs generally allege predicate violations of the Federal Food, Drug, and Cosmetic Act (FDCA) and its implementing regulations, as well as California's Sherman Food, Drug, and Cosmetic Law (Sherman Law), which largely mirrors the FDCA.

Before *Bruton*, many courts held that it is not sufficient merely to allege that the defendant's label technically violated the FDCA or Sherman Law. Rather, in these courts' view, a plaintiff must also allege that the violation resulted in deception of reasonable consumers.

In *Bruton*, the Ninth Circuit held the opposite. Without acknowledging the conflicting authorities, it held that "[t]he best reading" of California law is that UCL "unlawful"-prong claims do *not* require any showing that a challenged statement is deceptive or misleading—that is, unless such a showing is an element of the predicate statute that the defendant allegedly violated. Since the FDCA and Sherman Law do not require a showing of deception to state a violation, UCL "unlawful"-prong claims premised on violations of those statutes do not require such a showing, either.

A novel theory of deception based on implicit comparison

Next, the Ninth Circuit gave its imprimatur to Bruton's theory of deception under the UCL "fraudulent" prong: that

Gerber's label claims, even if completely true, give the misleading impression that Gerber's products are "superior" to other competing products when juxtaposed with the labels of those competitor products lacking similar claims.

While acknowledging that this theory of deception is "unusual," the panel felt that it "comports with common sense": if a reasonable shopper sees two products in the supermarket aisle, one that makes a certain claim and a second, otherwise identical product that does not, the shopper may well perceive an implicit message that the first product is superior to the second. Even if the express product claim is true, the implicit comparison that the shopper derives may still be false or misleading if the first product is not, in fact, superior.

No extrinsic evidence of deception necessary

Finally, the Ninth Circuit held that, even under the UCL's "fraudulent" prong, the district court had erred by requiring Bruton to adduce a survey or other extrinsic evidence of consumer deception. In the panel's view, "[t]he key evidence" in a false-advertising case "is the labels" themselves. Bruton, in other words, was entitled to place Gerber's labels before a jury and seek a ruling that they deceive a significant cross-section of reasonable California consumers, without any empirical (or even anecdotal) evidence that this is so.

Judge O'Scannlain's partial dissent

Judge O'Scannlain, one of the Ninth Circuit's more conservative jurists, dissented in part. He joined the panel's holding as to the UCL "unlawful" prong and its holding recognizing the viability of Bruton's "unusual" theory of deception. However, he believed that Gerber's labels, standing alone, were not sufficient evidence of consumer deception to survive summary judgment.

Notably, Judge O'Scannlain did not dispute that a product label, standing alone, can suffice to get to a jury in an ordinary case involving a claim (such as "Made in the U.S.A.") that is alleged to be literally false. But he believed that Bruton's theory of deception was not so straightforward, and so required extrinsic evidence to support it.

Reason for concern, but all is not lost

Bruton gives all businesses who advertise or sell products in California reason for concern:

- First, more consumers may now attempt to prosecute UCL "unlawful"-prong claims based on statements in labeling or advertising that are true and nonmisleading, but allegedly fail to comply with governing statutes or regulations in some technical manner.

- Second, if *Bruton* is taken literally, then every express labeling or advertising claim now also conveys an implicit comparison with competitor products. For example, when a manufacturer claims that its product is "sugar free," it is not just making a claim about its own product's sugar content; it is now also implicitly claiming that competing products that do not make the same claim are *not* sugar free. No other court has ever held this, and for good reason: if this were truly the law, a manufacturer could never safely tout any product feature in its labeling or advertising unless its product is literally the only one on the market with that feature.

- Third, *Bruton's* holding that product labels themselves are sufficient to get before a jury—even in cases involving novel theories of deception—means that more meritless cases will likely survive summary judgment.

But all may not be lost. For one thing, *Bruton* was an unpublished memorandum disposition, and accordingly, is "not precedent" under Ninth Circuit rules. Courts may treat it as persuasive authority, but they are not bound by it.

For another, several promising arguments remain available to Gerber on remand (and to other defendants facing similar claims in the future):

- UCL plaintiffs—whatever "prong" they sue under—must show actual reliance on the challenged statements. Here, it is not clear that Bruton actually relied on Gerber's claims.

- UCL plaintiffs seeking monetary relief—under any "prong" of the statute—must prove the amount of their damages through competent evidence. Here, it is far from clear that Bruton's damages expert sufficiently showed a "price premium" associated with the challenged statements.

- Finally, as the Supreme Court recently held in *Spokeo Inc. v. Robins*, naked statutory or regulatory violations are not sufficient to create an Article III injury-in-fact without some real-world harm. Thus, even if California law permits UCL "unlawful"-prong claims based on true and nonmisleading statements that fail to comply with technical regulations, *Spokeo* may not.

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