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TELEVISION ADVERTISING: AND NOW A WORD FOR OUR SPONSORS

And now a word for our sponsors; and for consumers who want to keep them honest. In *Committee on Children's Television, Inc. v. General Foods, Corp.*,¹ the California Supreme Court held that members of the general public, or their representative organizations, could state a cause of action against a sponsor for injunctive relief and restitution under unfair competition² and false advertising law.³

The controversy centered on the allegedly misleading advertising used in the marketing of certain sugared cereals.⁴ The plaintiffs⁵ filed a class action on behalf of "California residents who have been misled or deceived, or are threatened with the likelihood of being deceived or misled," by defendants⁶ in connection with the marketing of the cereals.⁷

The Advertisers had engaged in a "nationwide, long-term advertis-

1. 35 Cal. 3d 197, 673 P.2d 660, 197 Cal. Rptr. 783 (1983).

2. CAL. BUS. & PROF. CODE § 17200 *et seq.* (West Supp. 1985). Section 17200 defines unfair competition to "mean and include unlawful, unfair or misleading advertising"

3. CAL. BUS. & PROF. CODE § 17500 *et seq.* (West Supp. 1985). Section 17500 states that:

It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, any statement, . . . which is untrue or misleading, and which is known, or which by the exercise or reasonable care should be known, to be untrue or misleading

4. General Foods manufactures five such cereals—Alpha Bits, Honeycomb, Fruity Pebbles, Sugar Crisp, and Cocoa Pebbles—which contain thirty-eight to fifty percent sugar by weight. The complaint referred to them as "candy breakfasts." *Committee on Children's Television*, 35 Cal. 3d at 204-05, 673 P.2d at 664, 197 Cal. Rptr. at 787.

5. Those named included five organizations (The Committee on Children's Television, Inc.; the California Society of Dentistry for Children; the American G.I. Forum of California; the Mexican American Political Association; and the League of Latin American citizens), individual adults, and individual children. *Id.* (Hereinafter the plaintiffs will be referred to collectively as the Committee.)

6. Besides General Foods, named corporate defendants included advertising agencies Benton and Bowles, Inc., and Ogilvy and Mather International, Inc., and retailers Safeway Stores (which sold the products to individual plaintiffs). *Id.* (Hereinafter the defendants will be referred to collectively as the Advertisers.)

7. *Committee on Children's Television*, 35 Cal. 3d at 204-05, 673 P.2d at 663-64, 197 Cal. Rptr. at 786-87. The Advertisers's demurrers did not attack and thus the court did not decide the propriety of the case as a class action. However, the consumer protection statutes involved provide for the maintenance of such an action by a private attorney general (on behalf of the public). Therefore the Committee did not lack standing to sue under these statutes even if the class should fail to be certified. See CAL. BUS. AND PROF. CODE §§ 17204 and 17535.

ing campaign designed to persuade children to influence their parents”⁸ to buy these products. The campaign, which sought to persuade “by imagery and example,”⁹ maintained a constant theme,¹⁰ though individual advertisements were changed often. The Committee asserted that the Advertisers made misrepresentations¹¹ and concealed material facts¹² in their television commercials, a combination which allegedly rendered the advertisements misleading and deceptive.¹³ The Committee divided the complaint into seven causes of action: the first two were based on state consumer protection statutes,¹⁴ numbers three through six on statutory and common law fraud, and number seven on breach of fiduciary duty.

The trial court sustained the Advertisers’s demurrer to all causes of action in the Committee’s fourth amended complaint without leave to amend. The trial judge agreed with the Advertisers’s claim that the allegations lacked specificity,¹⁵ and he stated that the Advertisers were not given enough information concerning that which they must answer. The judge concluded that the complaint did not give the court “a sufficient factual basis for its administration of the case.”¹⁶

The Committee appealed the decision to the supreme court. In a unanimous opinion authored by Justice Broussard, the court reversed the lower court’s holding as to the consumer protection based causes of action, modified the holding regarding the fraud causes of action, and af-

8. *Committee on Children’s Television*, 35 Cal. 3d at 222, 673 P.2d at 676, 197 Cal. Rptr. at 799.

9. *Id.*

10. See note 11 *infra*, and accompanying text.

11. *Committee on Children’s Television*, 35 Cal. 3d at 205 n. 3, 673 P.2d at 664, 197 Cal. Rptr. at 787. The complaint listed nineteen primarily implicit representations made in the defendants’ advertisements, including the following: that eating such products is “the ‘fun’ thing to do,” that the products possess or impart “magical powers,” that adding small amounts of vitamins and minerals to a product automatically makes it “nutritious,” and that “bright colors in foods . . . correlate with nutritional merit.” The Committee alleged that such representations also appear in other media, and on the cereal packages themselves.

12. The Committee claimed that the advertisements concealed facts such as that “there is no honey in Honeycomb, no fruit in Fruity Pebbles,” and that sugared cereals contribute to tooth decay and can have more serious medical consequences. *Id.* at 206 n.4, 673 P.2d at 665, 197 Cal. Rptr. at 788.

13. *Committee on Children’s Television*, 35 Cal. 3d at 207, 673 P.2d at 665, 197 Cal. Rptr. at 788.

14. See *supra* notes 2 & 3.

15. *Committee on Children’s Television*, 35 Cal. 3d at 208, 673 P.2d at 666, 197 Cal. Rptr. at 789. The judge referred to the complaint as “just a series of very general allegations to which there is no reference of an advertisement actually made”

16. *Id.* at 208, 673 P.2d at 666, 197 Cal. Rptr. at 790. [Note: neither the trial court opinion nor the court of appeals apparent affirmation were published.]

firmed the holding sustaining the demurrer to the breach of fiduciary duty cause of action.

In analyzing the cause of action under the state unfair competition laws, the court emphasized the broad definition given "unfair competition."¹⁷ To illustrate, the court quoted its opinion in *Barquis v. Merchants Collection Association*:¹⁸ "the language of section 17200 'demonstrates a clear design to protect consumers as well as competitors [from fraud and deceit], permitting . . . any member of the public to sue on his own behalf or on behalf of the public generally.'"¹⁹ And just as it had done in *Barquis*, the court broadly interpreted the term "unfair competition" and stated that "[t]he legislature apparently intended to permit courts to enjoin ongoing wrongful business conduct in whatever context such activity might occur."²⁰

The court then equated with the unfair competition law, the intent and requirements of the state false advertising law.²¹ The latter is essentially unfair competition (fraud or deceit) through the use of any advertising media.²² The court explained that to state a cause of action under either statute for injunctive relief, the only requirement was a showing that " 'members of the public are likely to be deceived'²³ . . . Allegations of actual deception, reasonable reliance, and damage are unnecessary."²⁴

17. See *supra* note 2. Also relevant is the language appearing in § 17203:

"Any person performing or proposing to perform an act of unfair competition within this state may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments . . . as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition."

CAL. BUS. & PROF. CODE § 17203 (West Supp. 1985).

18. 7 Cal. 3d at 94, 496 P.2d 817, 101 Cal. Rptr. 745 (1972). In *Barquis*, the supreme court held that a collection agency's practice of abusing judicial process to impair debtors' ability to defend lawsuits could be enjoined as an unlawful business practice under section 3369 of the Civil Code. Section 3369 was the forerunner of Bus. & Prof. Code § 17200 *et. seq.* See generally, Howard, *Former Civil Code, Section 3369: A Study in Judicial Interpretation*, 30 HASTINGS L.J. 705 (1979).

19. *Committee on Children's Television*, 35 Cal. 3d at 209, 673 P.2d at 667, 197 Cal. Rptr. at 790, quoting *Barquis*, 7 Cal. 3d at 110, 496 P.2d at 828, 101 Cal. Rptr. at 761.

20. *Id.* See *People v. McKale* 25 Cal. 3d 626, 602 P.2d 731, 159 Cal. Rptr. 811 (1979).

21. See *supra* note 2.

22. Any violation of the false advertising law necessarily violates the unfair competition law. *Committee on Children's Television*, 35 Cal. 3d at 210, 673 P.2d at 668, 197 Cal. Rptr. at 791.

23. *Id.* at 211, 673 P.2d at 668, 197 Cal. Rptr. at 791, quoting *Chern v. Bank of America* 15 Cal. 3d 866, 876, 544 P.2d 1310, 1316, 127 Cal. Rptr. 110, 116 (1976). See *Payne v. United California Bank* 23 Cal. App. 3d 850, 100 Cal. Rptr. 672 (1972); *People ex rel Mosk v. National Research Co.*, 201 Cal. App. 2d 765, 20 Cal. Rptr. 516 (1962). See also *Audio Fidelity, Inc. v. High Fidelity Recordings, Inc.*, 283 F.2d. 551, 557 (9th Cir. 1960).

24. *Committee on Children's Television*, 35 Cal. 3d at 211, 673 P.2d at 668, 197 Cal. Rptr.

The same minimal showing may lead to an order of restitution if a court should "determine that such a remedy is necessary 'to prevent the use or employment' of the unfair practice."²⁵

The supreme court rejected the Advertisers's claim that the consumer protection causes of action were insufficient in that they failed to describe the alleged deceptive practices with the requisite particularity.²⁶ The court interpreted its decision in *People v. Superior Court*²⁷ as holding that a plaintiff in a consumer action is not required to plead the exact language of every deceptive statement; rather, it is sufficient for a plaintiff "to describe a scheme to mislead customers, and allege that each misrepresentation . . . conforms to that scheme."²⁸ The Committee pled just such a scheme. In addition, the court emphasized that since a demurrer was in issue, only the legal sufficiency of the pleading was tested.²⁹ Therefore, the Advertisers's contentions regarding whether or not their words and images were actually misrepresentations "frame[d] an issue for trial, not demurrer," the court held.³⁰

Lastly, the court cited policy considerations which prompted the overruling of the demurrer: requiring the Committee to plead the specifics of each advertisement would be impractical and would have an undesirable deterrent effect.³¹ The court noted that the complaint would need to include "thousands of pages" of information largely in the Advertisers's possession; the attendant costs, the court reasoned, would "seriously deter the filing of any such complaint . . . discourag[e] private suits [and] . . . seriously hamper suits by public officials seeking to enjoin

at 791. See also *Hernandez v. Atlantic Finance Co.*, 105 Cal. App. 3d 65, 164 Cal. Rptr. 279 (1980), where the daughter of the injured party was allowed to bring the action.

25. *Committee on Children's Television*, 35 Cal. 3d at 211, 673 P.2d at 668-69, 197 Cal. Rptr. at 792, quoting *Fletcher v. Security Pacific National Bank*, 23 Cal. 3d 442, 453, 591 P.2d 51, 58, 153 Cal. Rptr. 28, 35 (1979).

26. The Advertisers argued that the complaint should state specific language and persons, and the specific time, date, and place of the deception.

27. 9 Cal. 3d 283, 507 P.2d 1400, 107 Cal. Rptr. 192 (1973). Jayhill Corporation ("Jayhill") real party in interest. In this case, where defendant encyclopedia salesmen were charged with false and misleading advertising in violation of § 17500 *et. seq.*, the salesmen similarly argued that the complaint was insufficient because it did not state the names of the customers allegedly solicited, the soliciting salesman nor the time and place of the misrepresentation. The court stated that "these evidentiary facts need not be pleaded," and that "[if] defendants require further specifics in order to prepare their defense, such matters may be the subject of discovery proceedings." *Id.* at 288, 507 P.2d at 1403, 107 Cal. Rptr. at 195.

28. *Committee on Children's Television*, 35 Cal.3d at 212-13, 673 P.2d at 669, 197 Cal. Rptr. at 792.

29. *Id.* at 213, 673 P.2d at 670, 197 Cal. Rptr. at 793.

30. *Id.* at 214, 673 P.2d at 670, 197 Cal. Rptr. at 793.

31. *Id.* at 214, 673 P.2d at 670-71, 197 Cal. Rptr. at 793-94.

schemes of unfair competition and deceptive advertising.”³² Thus, the supreme court held that the causes of action based on consumer protection statutes were properly pled.

In contrast, the court found that the causes of action based on fraud were not sufficiently pled, but that leave to amend should have been granted.³³ In its analysis of these causes of action, the court first noted certain exceptions to the strict specific pleading requirements normally associated with a fraud cause of action. The first exception is that less specificity is required when a defendant “‘must necessarily possess full information concerning the facts of the controversy.’”³⁴ The court reasoned that the Advertisers clearly knew the contents of each advertisement.

Second, the court once again noted that “considerations of practicality enter in.”³⁵ The court reasoned that the amended sixty-four page complaint already strained the limits of reasonable length; that is, it would be less than practical to require the setting out of each advertisement used (over the span of the four year period in question) along with the corresponding details, when this would consume thousands of pages.³⁶ The court further reasoned that the “realistic setting” of the case would make “impossible” the specific pleading of the particular children who relied on particular advertisements; it declared that “[p]laintiffs should be able to base their cause of action upon an allegation that they acted in response to an advertising campaign even if they cannot recall the specific advertisements.”³⁷

However, while the court did hold that the complaint was sufficient to define the subject of the action and to provide notice to the Advertisers, it also held that the trial court could reasonably require the Committee to furnish a representative selection of advertisements. The court opined that this was a sensible compromise between the Advertisers’ right to a sufficiently specific pleading, and the importance of avoiding prohibitively burdensome pleading requirements in cases involving multiple misrepresentations.³⁸

32. *Id.*

33. *Id.* at 220-21, 673 P.2d at 675, 197 Cal. Rptr. at 798.

34. *Id.* at 217, 673 P.2d at 672, 197 Cal. Rptr. at 795, quoting *Bradley v. Hartford Acc. and Indem. Co.*, 30 Cal. App. 3d 818, 106 Cal. Rptr. 718 (1973).

35. *Committee on Children’s Television*, 35 Cal. 3d at 217, 673 P.2d at 672, 197 Cal. Rptr. at 796.

36. *Id.* at 217, 673 P.2d at 673, 197 Cal. Rptr. at 796.

37. *Id.* at 219, 673 P.2d at 674, 197 Cal. Rptr. at 797. This is one area where the court clearly indicated a desire to stretch the traditional notions of pleading; no authority was cited for this proposition.

38. *Id.* at 219, 673 P.2d at 674, 197 Cal. Rptr. at 797.

Another of the Advertisers's claims rejected by the court was that the complaint was deficient because it alleged that the *children* were deceived, but the *parents* buy the product. Here the court stated that not only was the claim inconsistent with the Advertisers's own advertising strategy but that the applicable law was inconsistent with their argument. The Restatement Second of Torts Section 533 states that:

"[t]he maker of a fraudulent representation is subject to liability . . . to another who acts in justifiable reliance . . . if the misrepresentation . . . is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct."³⁹

Recognizing that the Committee did not allege that the children actually repeated the representations, the court reasoned that repetition should not be a prerequisite to liability, and concluded that "it should be sufficient that the defendant makes a misrepresentation to one group intending to influence the behavior of the ultimate purchaser, and that he succeeds in this plan."⁴⁰

But, the court ruled that the complaint was insufficient in the pleading of damages.⁴¹ First, the court held that any money spent by the organizational plaintiffs to counter the influence of the advertising should be categorized as voluntary expenditures, and not considered to be the result of any legally cognizable injury to the organization.⁴² Second, regarding the individual plaintiffs the court ruled that a trial court could properly find the complaint "uncertain"⁴³ in its failure to plead any specific health injury to the children or any specific sums spent by the parents to treat those injuries.⁴⁴

Thus, regarding the fraud causes of action, the supreme court upheld the sustaining of the demurrer, but disapproved of the lower court's denial of leave to amend. The court, accordingly, modified the judgment to permit the Committee to cure any uncertainty or lack of specificity with regard to the individual plaintiffs.

Finally, the lower court's sustaining of the demurrer to the cause of

39. *Id.* quoting RESTATEMENT (SECOND) OF TORTS § 533 (1977).

40. *Id.* Here again the court did not let a lack of precedent inhibit the finding of the logical—and desired—result.

41. Damage is an essential element in the pleading of fraud. 5 WITKIN ON PROCEDURE § 680 (3d. ed. 1985).

42. *Committee on Children's Television*, 35 Cal. 3d at 220, 673 P.2d at 674, 197 Cal. Rptr. at 798.

43. *Id.*

44. *Id.*

action based on breach of fiduciary duty was affirmed. Here the court held that "the various statutory and common law doctrines fashioned to protect the consumer from overreaching and deception are strong and flexible enough to accomplish that purpose," such that there is no need to try to apply the law of fiduciary relationships "to perform a function for which it was not designed and is largely unsuited."⁴⁵

The significance of this case extends beyond the realm of procedure. It is axiomatic that without the sponsors, the show could not go on. In today's multimedia, capitalistic society, advertising plays an enormous role. The system runs on money: to earn it, one must sell; to sell, one must advertise. As a result, advertising has become a multi-billion dollar industry.⁴⁶ Not surprisingly, competition for accounts is intense, and resorting to deception to sell a sponsor's product is unfortunately, but perhaps inevitably, not uncommon. The public, therefore, needs safeguards, or alternatively, a method of fighting back. The California Supreme Court took the opportunity in *Committee on Children's Television* to preserve the private lawsuit method.

The court realized that if it were to apply strict requirements of specificity in pleading, "the result would be to eliminate the private lawsuit as a practical remedy to redress such past deception or prevent further deception."⁴⁷ Furthermore, the court was concerned that such a holding would enable advertisers, "[b]y directing their advertisements to children and changing them frequently," to obtain "practical immunity from statutory and common law remedies designed to protect consumers from misleading advertising."⁴⁸ The court recognized the "compelling interest"⁴⁹ in protecting the public from being victimized by false and/or deceptive advertising.⁵⁰ So, instead of applying strict pleading requirements, the court delineated requirements that were as lenient as practicable; thus, not even an actual showing of deception is necessary.⁵¹

There is, however, a shortcoming in the decision from the stand-

45. *Id.* at 222, 673 P.2d at 676, 197 Cal. Rptr., at 799.

46. ADVERTISING AGE, May 30, 1983, at 42 col. 4.

47. *Committee on Children's Television*, 35 Cal. 3d at 222, 673 P.2d at 676, 197 Cal. Rptr. at 799.

48. *Id.* at 222-23, 673 P.2d at 676, 197 Cal. Rptr. at 799.

49. For a case dealing with the Constitutional aspects of consumer protection statutes, see *People v. Superior Court, Orange County (Forest E. Olson, Inc. et al. real parties in interest)*, 96 Cal. App. 3d 181, 157 Cal. Rptr. 628 (1979).

50. The court has previously referred to the importance of the protection of unwary consumers as "an exigency of the utmost priority in contemporary society." *Vasquez v. Superior Court* 4 Cal. 3d 800, 808, 484 P.2d 964, 968, 94 Cal. Rptr. 796, 800 (1971); *Fletcher v. Sec. Pac. Nat'l Bank*, 23 Cal. 3d 442, 451, 591 P.2d 51, 56, 153 Cal. Rptr. 28, 33 (1979).

51. This is quite significant considering that deception is the essence of false advertising.

point of consumer recovery: the court failed to incorporate Chief Justice Bird's concurring and dissenting opinion expressing the view that noncompetitor plaintiffs may recover damages under the consumer protection statutes.⁵² While the court suggested that the Committee would have an adequate remedy without such an addition to the opinion,⁵³ future plaintiffs may be unable to state a cause of action in fraud and therefore be unable to recover damages.⁵⁴ The California Court of Appeals previously allowed noncompetitors to recover damages in *United Farm Workers of America v. Superior Court*.⁵⁵ But the main obstacle blocking the supreme court's adoption of that position appears to be its decision in *Chern v. Bank of America*,⁵⁶ decided the year after *United Farm Workers*.

In *Chern*, the court held that damages are not recoverable under the false advertising law; however, it was silent on the question of whether damages are recoverable under the unfair competition law. It is signifi-

52. Federal courts have recently eliminated this obstacle to consumer recovery. See *Thorn v. Reliance Van Co.*, 736 F.2d 929 (3d Cir. 1984).

53. The court explained that "the nonorganizational plaintiffs can recover damages under their causes of action for fraud, while the organizational plaintiffs have suffered no legally cognizable damages under any cause of action." *Committee on Children's Television*, 35 Cal. 3d at 215, 673 P.2d at 671, 197 Cal. Rptr. at 794. However, the court did not say why an organization "voluntarily" spending money to correct or counter a perceived malefaction should not be able to recover from a liable perpetrator. Neither did the court explain why such a monetary loss is not "legally cognizable."

54. *Committee on Children's Television*, 35 Cal. 3d at 224-25, 673 P.2d at 677-78, 197 Cal. Rptr. at 801. Fraud requires a showing that the defendant made an untrue assertion of fact which the defendant knew or should have known to be false. Consumer protection statutes can be triggered by unintentionally made *misleading* statements. Although courts have rendered recent decisions which have chipped away at this distinction (e.g. *Hauter v. Zogarts*, 14 Cal. 3d 104, 534 P.2d 377, 120 Cal. Rptr. 681 (1975)) a distinction still exists.

55. 47 Cal. App. 3d 334, 120 Cal. Rptr. 904 (1975). (*Pandol Brothers, Inc.* real parties in interest). This case involved, in relevant part, claims of unfair competition and false representations to the public, arising out of the defendant corporation's alleged unauthorized use of the plaintiff's trademark. The court stated:

The fact that the statutes sound in equity and by their terms do not specify that damages be awarded does not bar the recovery of damages in a proper case even though the action be one in equity rather than law. This is made clear in [*Jayhill*].

Id. at 344, 120 Cal. Rptr. at 912.

The court went on to quote *Jayhill*, in which the supreme court stated: "In the absence of such a restriction [prohibiting an award of damages] a court of equity may exercise the full range of its inherent powers in order to accomplish complete justice between the parties . . ." *Id.* at 344-45, 120 Cal. Rptr. at 911 (quoting *Jayhill*, 9 Cal. 3d. at 286, 507 P.2d at 1402, 107 Cal. Rptr. at 194). The court of appeals further stated that *Jayhill* implied that in a case where an individual was directly injured, even exemplary damages might be proper. *United Farm Workers*, 47 Cal. App 3d at 345, 120 Cal. Rptr. at 911.

56. 15 Cal 3d 866, 544 P.2d 1310, 127 Cal. Rptr. 110 (1976). *Chern* involved a class action suit brought by a bank customer under the false advertising law alleging that the banks method of computing interest rates and resultant advertising was misleading.

cant that the court did not decide the question in *Committee on Children's Television* by merely extending *Chern*.⁵⁷

Thus, while the *Chern* precedent may remain undisturbed, perhaps the court simply has yet to be faced with a case and fact pattern which clearly dictates its *en banc* reevaluation. Ultimately, regardless of whether the supreme court eventually chooses to abandon the *Chern* precedent, as suggested by Chief Justice Bird, consumers are in a better position to "fight back" in California after *Committee on Children's Television v. General Foods*.⁵⁸ And even if consumers don't take advantage of the easier access to the court system, the court should be lauded for its conscientious opinion; if nothing else, it has taken an affirmative step toward making it more difficult for advertisers to take candy to a baby.⁵⁹

Rick Goldfarb

57. Not only did the court not *extend Chern*, but in a footnote it instructed the reader to compare *United Farm Workers* with *Chern*. Surely if the supreme court were content with the *Chern* decision, it would not put it on equal footing, authoritatively, with a court of appeals decision.

58. In other words, this decision has given the public their first real chance to "fight back" independently of well known consumer advocate David Horowitz.

59. "Candy breakfasts," that is. For a treatment of *Committee on Children's Television* consistent with this casenote, see Kotler, *And Now This Commercial Brake*, 8 CAL. LAWYER 29 (1985).

