California Unfair Competition Defense Podcast

Episode 10

Greenberg Traurig

Announcer (00:00):

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Lisa Simonetti (00:19):

Greetings all and welcome to the California Unfair Competition Defense Podcast. I'm Lisa Simonetti and my co-host is Greg Nylen. In this episode, we will look at potential liability for omissions, specifically whether omissions may serve as the basis for a claim under the fraudulent prong of the UCL and/or the CLRA, has been a significant topic over the last 20 years. Greg, can you take us back to the beginning?

Greg Nylen (00:45):

Courts first started to grapple with this issue in a serious way in the late 1990s. I'm going to review some of the key cases on this issue now, starting with Stevens v. Superior Court, 75 Cal.App.4th 594, 604. It's 1999. That case involved a claim where the defendants were selling insurance without a license in violation of the insurance code and the defendants attempted to characterize the case as involving what it claimed were non-actionable omissions, but the Court of Appeal held it was simply about unlawfully selling insurance without a license. Another seminal case is Schnall v. Hertz Corp.

(01:25):

That's 78 Cal.App.4th 1144, 2000. The Court of Appeal held that a car rental company's practice of disclosing its otherwise lawful fuel service charges in a separate disclosure document could be deceptive. There's also Day v. AT & T Corp., 63 Cal.App.4th 325, 324, 1998. In that case, the Court of Appeal found it could be misleading for the defendant to sell prepaid phone cards without first disclosing the calls will be debited by rounding up to the next whole minute. There's also Podolsky v. First Healthcare Corp., 50 Cal.App.4th 632, 1996.

(02:05):

In that case, the Court of Appeal held that the defendant nursing home's practice of asking patients' families to guarantee patients' bills was deceptive because even though defendant's guarantee form indicated that guarantor's signature is not required, the defendants did not inform the proposed guarantors how little they might actually receive an exchange. The court held that full disclosures should be given to promote free choice. And lastly, there's Massachusetts Mutual Life Insurance Company v. Superior Court.

(02:34):

That's 97 Cal.App.4th 1282, 2002. The court held that the defendant violated the UCL by failing to disclose internal corporate views regarding the amount of future dividends they plan to pay under a vanishing premium life insurance policy.

Lisa Simonetti (02:50):

That's right, Greg. And then after these early decisions, courts began holding that claims under the fraudulent prong can be based on omissions only if the defendant has an affirmative duty to disclose. This comes up especially in product liability cases involving warranty claims. For instance, in Daugherty v. American Honda Motor Co., 144 Cal.App.4th 824 in 2006, a manufacturer was found not liable under the fraudulent prong.

(03:18):

The court found that defendant had no duty to disclose a potential product defect "that might or might not shorten the effective lifespan of an automobile part that functions precisely as warranted throughout the term of its express warranty." The court also found that a manufacturer is not liable for fraudulent omission concerning a latent defect under the CLRA, unless the omission is "contrary to a representation actually made by the defendant or an admission of the fact the defendant was obliged to disclose."

(03:50):

Then in Clemens v. DaimlerChrysler Corp., 534 F.3d 1017 from the Ninth Circuit in 2008, the court noted that other courts have viewed fraudulent concealment cases under the UCL with skepticism and held that a car manufacturer did not violate the fraudulent prong of the UCL in a case involving defective head gaskets because no reasonable consumer would've expected a head gasket to last pass the warranty.

(04:16):

But you can compare Falk v. General Motors Corp., 496 F. Supp. 2d 1088 from the Northern District of California in 2007 distinguishing Daugherty because in Falk, plaintiff alleged there were hundreds of internet postings in which consumers and repair shops complained of speedometer issues relating to defendant's vehicles. And under those circumstances, the court found a duty to disclose such defects. And importantly, courts have also applied this logic in areas aside from products and warranties.

(04:46):

For example, in Berryman v. Merit Property Mgt., 152 Cal.App.4th 1544, 2007, the court held no duty for a homeowners association to disclose a breakdown of HOA fees, and thus, no UCL violation.

Greg Nylen (05:01):

Note that where omissions involve a safety issue, courts are more likely to find a duty to disclose. For example, in In re Onstar Contract Litigation that's 600 F. Supp. 2d 861, 869 to 870, Eastern District of Michigan 2009, the court applied California law and held that the defendant had a duty to disclose that analog in vehicle telecommunication safety systems would become obsolete, even though the express warranty period had expired. In fact, a case in the Ninth Circuit has held that an omission must involve a safety issue to be actionable under the UCL.

(05:39):

A good case on that point is Wilson v. Hewlett-Packard Co., 668 F.3d 1136, 1143 Ninth Circuit 2012, noting that in a case called Daugherty, which we mentioned earlier, the court found that plaintiff alleged no facts establishing that the manufacturer was "bound to disclose" because the plaintiff did not allege "any instance of physical injury or any safety concerns posed by the defect." Rather, the plaintiff merely alleged that the risk posed by the alleged defect was the cost to repair the product, which did not give rise to a duty to disclose.

(06:17):

The court held to state a claim under the UCL based on the failure to disclose, plaintiff must allege that the alleged laptop design defect issue, the laptop sometimes displayed a low power warning even when plugged into an outlet caused an unreasonable safety hazard. Another case to take a look at on this point is Oestreicher v. Alienware Corp., 544 F. Supp. 2d 964, 972 to 973, it's Northern District of California 2008. We're including cites, by the way, because we think it's helpful.

(06:51):

That case noted that "although California courts are split on this issue, the weight of authority suggests that the duty to disclose is limited to safety issues." Similar holding in another case called In re Sony Grand Wega KDF-E A10/A20 Series Rear Projection HDTV Television Litigation, tons of letters and words, 758 F. Supp. 2d 1077, 1095, that's a Southern District of California 2010 case, had the exact same holding. Again, another case, Morgan v. Harmonix Music Systems Inc. That one's 2009 Westlaw 2031765.

(07:33):

That's a Northern District, California July 7th, 2009 case. That court held that "according to all relevant case law, defendants are only under a duty to disclose a known defect in a consumer product when there are safety concerns associated with the products used."

Lisa Simonetti (07:47):

There are policy considerations underlying these holdings. For example, courts have noted that broadening the duty to disclose "would eliminate term limits on warranties effectively making them perpetual or at least for the useful life of the product." That's from Oestreicher, 972. California courts following this rule have held that if a contrary rule applied, "failure of product to last forever would become a defect, a manufacturer would no longer be able to issue limited warranties and product defect litigation would become as widespread as manufacturing itself."

(08:22):

That's from Daugherty at 829. But compare these cases to those in which the defendant actively concealed the defect or material fact they were aware of or about which they made representations to the contrary. For instance, there is Baggett v. Hewlett-Packard Co., 582 F. Supp. 2d 1261. That's from the Central District of California 2007. Plaintiff alleged that HP's printers indicated that the printer cartridges were empty when in fact they still contained ink. The plaintiff did not allege that the printers contained a latent defect, but that HP had represented that the cartridges were empty.

(09:00):

Several other cases concerned services rather than manufactured product, which courts have found can make a difference in this analysis. For example, there's In re Metascan Research Limited 940 F.2d 558, that's from the Ninth Circuit 1991, holding that appellant had a duty to disclose that the terms of an offering of limited partnership shares had been modified.

(09:23):

There's Stickrath v. Globalstar, Inc., 2008 Westlaw 344,209 from the Northern District of California February 2008, holding that plaintiff successfully alleged concealment of a defect in the defendant's satellite telephone service, and Lovejoy v. AT&T Corp., 92 Cal.App.4th 85 in 2001, finding that plaintiff stated a fraudulent concealment claim based on AT&T's appropriation of plaintiff's 1800 number.

Greg Nylen (09:52):

As noted earlier, some California courts have held that you can state a claim under the UCL or CLRA based on a failure to disclose that does not involve a safety issue. How do you approve a duty to disclose or lack thereof in those cases? Courts have pointed to four circumstances. One, when the defendant is plaintiff's fiduciary. Two, when the defendant has exclusive knowledge of material facts not known or reasonably accessible to plaintiff. Three, when the defendant actively conceals material facts from the plaintiff.

(10:23):

And four, when the defendant makes partial representations that are misleading because some other material facts has not been disclosed. On that point, you can take a look at Collins v. Emachines Inc., 202 Cal.App.4th 249, 255, 2011. In that case, the court found that defendants alleged knowledge of a faulty microchip that controlled a floppy disc drive resulting in the corruption of data gave rise to a duty to disclose. However, as the court noted in Oestreicher, which we mentioned earlier, all of these situations except the first one involving a fiduciary relationship require materiality.

(11:03):

And to that end, the Falk case held "in order for a non-disclosed information to be material, a plaintiff must show that had the omitted information been disclosed, one would've been aware of it and behaved differently." The materiality for CLR claims, in other words, is judged by the effect on a reasonable consumer.

Lisa Simonetti (11:24):

There are some other interesting twists in this area of the law. For example, in Animal Legal Defense Fund v. Mendes, 160 Cal.App.4th 136 from 2008, the court held that the plaintiff could not state a claim based on "moral injury," based on the theory that they were being deprived of the benefit of a bargain because the defendant did not make affirmative statements that the milk producing cattle were being treated in an allegedly humane fashion.

(11:51):

Also, take a look at Sud v. Costco Wholesale Corp., 229 F. Supp. 3d 1074 from the Northern District of California 2017, finding no duty to disclose to purchasers of prawns sold at retail that supplier may have utilized slave labor and human trafficking, where plaintiffs did not allege that the labor practices "while horrific constitute a safety risk to consumers or constitute a product defect." In Levine v. Blue Shield of California, 189 Cal.App.4th 1117 from 2010, plaintiffs tried to allege that defendant owed a duty to disclose that they could have reduced their health insurance costs by designating the younger spouse as primary under the policy.

(12:36):

Plaintiffs contended that this duty sprang from a statute, insurance code section 332, which requires each party to a contract of insurance to "communicate to the other in good faith all facts within his knowledge" that are material and "which the other has not the means of ascertaining." The court refused to read the statute so broadly and dismissed the claim for failure to allege a duty to disclose.

Greg Nylen (13:00):

Finally, there are a number of cases which have held that the UCL and CLRA do not impose a duty to disclose all possible fees or charges a plaintiff may incur in connection with goods or services. For example, in Gray v. Dignity Health, 70 Cal.App.5th 225, 238-242, 2021 case, so fairly recent, the court held that it's not a violation of the UCL for a hospital to fail to disclose a separate emergency services charge prior to providing emergency medical services. In Nolte v. Cedars Sinai Medical Center, 236

Cal.App.4th 1401, 1407-1408, it's a 2015 case, the court held it's not unfair for a hospital to fail to disclose a facility fee.

(13:46):

There's another case that you may see cited a fair bit is Plotkin v. Sajahtera, 106 Cal.App.4th 953, 966, 2003 case. It's been around for a while. Court held that there's no liability for the failure to disclose a $21 charge for valet parking. Now, Lisa, let's turn to the new case corner. What do you have for us?

Lisa Simonetti (14:07):

Greg, I have Yeraldinne Solis v. Coty, Inc. and Noxell Corporation. That is 2023 US District Lexis 38278, the Southern District of California, March 7th, 2023. Plaintiff filed a punitive class action alleging that defendants marketed a beauty product as safe and sustainable when it purportedly contained harmful and carcinogenic chemicals known as PFAS. The court granted defendant's motion to dismiss, holding that plaintiff failed to allege injury in fact under a benefit of bargain theory because she failed to show a nexus between statements that the cosmetic at issue was "dermatologically tested" and "suitable for sensitive skin" and her belief that the product was PFAS free.

(14:53):

The court also found "an even weaker link between the statements identified in defendant's online marketing materials and the purported safety benefit" that plaintiff believed she had bargained for but did not receive. The court finally found that plaintiff "is not free to ignore the ingredient list on the product label, which listed a certain type of PFA as an ingredient." The court found this disclosure deemed plaintiff's omission theory of liability, as well as her alternate overpayment theory of damages.

Greg Nylen (15:21):

One of the cases that I wanted to talk about this episode is Klammer v. Mondelez International, and that's 2023 US District Lexis 2939. This is a Northern District of California case from January 4th, 2023. In that case, the plaintiff filed a punitive class action alleging that defendant's use of the terms high protein and protein packed on the packaging for its enjoy life lentil chips was false and misleading, in violation of the UCL, FAL, and CLRA, because the chips allegedly were not high in protein and do not provide a good source of protein.

(15:58):

In granting the defendant's motion to dismiss, the court found that the term high protein when viewing the package as a whole was not likely to mislead reasonable consumers as a matter of law because the term never appeared in isolation and was used on the packaging to describe lentils and lentil flour. The court therefore found that it was implausible that reasonable consumers would understand the phrase high protein to refer to the quantity of protein contained in the chips.

(16:23):

The court also rejected plaintiff's contention that the phrase high protein lentils with an arrow pointing to the chips was deceptive because the argument fails "to meaningfully address the fact that high protein is never used in isolation and always used in connection with lentils or lentil flour, not the chips themselves." Interestingly, the court also rejected plaintiff's argument that the phrase high protein is misleading in any context unless it complies with FDA regulations because the plaintiff did not sufficiently alleged that the reasonable consumer is sufficiently aware of those regulations such that they would be mislead by the products alleged lack of conformity with the regulations.

(17:04):

The court also found that the phrase protein packed is non-actionable puffery. The court found that reasonable consumers would not be misled by that term because the nutrition facts on the back of the packaging clarify the grams of protein on the product and that there's no affirmative misleading statement to be dispelled by the ingredients list, and thus defendants could rely on it to shield them from liability.

(17:26):

And finally, the court rejected plaintiff's claim that defendants purported omission of the daily recommended value for protein on the packaging was misleading because plaintiff did not allege that he reviewed or relied on the nutrition facts panel or that its contents affected his purchasing decision. That's another good case on the omissions issue as well. Now to this episode's film recommendation. So many filmmakers these days in this film school grad's opinion lack a real creative vision.

(17:55):

Sure, they can manage the production of another action hero film just fine, but they aren't auteurs in their own right and they don't understand or at least lack the ability to convey a personal style in their film making, in my opinion. One of the exceptions to that rule is Wes Anderson. His style is so unique. There was a TikTok trend to publish clips in the style of Wes Anderson. This episode's film review relates to a movie directed by someone with an equally unique vision, Jordan Peele, specifically the film Nope.

(18:22):

This genre-bending picture is described by some as a horror film, but that's only in the very loosest sense of the word. Ostensibly, the movie is about an African American horse wrangling family with roots dating back to the early days of Hollywood, but it rapidly takes a very unexpected turn into a film about selling out in various interpretations of that phrase, as well as standing up to the unknown in the most extreme sense of that phrase.

(18:44):

There's also a lot of commentary about the film business built in and a villain that was so unexpected and insane, I will keep my comments vague in the hopes that you will see the movie with an open mind. There's a lot of quirky humor interspersed throughout some genuinely terrifying moments, but not in the jump scare sense. I'll just say that you won't view the trained monkeys they used to have on film sets the same way ever again. Go see this.

Lisa Simonetti (19:08):

Thank you, Greg. Everyone, you can mail questions to ucdefense@gtlaw.com and we'll see you next time.