TOP 20 FOOD AND DRUG CASES, 2014 AND CASES TO WATCH, 2015

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CHAPTER 10

KHASIN v. HERSHEY CO.

RIKIN MEHTA,* MADELEINE MCDONOUGH, AND JARA SETTLES

I. Why It Made the List

Khasin v. Hershey Co.[1] is another in a long series of putative class actions filed in the Northern District of California's consumer-friendly "Food Court."[2] *Khasin* illustrates how the overbreadth of claims contained in plaintiffs' consumer protection complaints can stand in stark contrast to plaintiffs' actual (and sometimes quite limited) damages. This chapter will outline Hershey's successful motion for partial summary judgment, which removed Khasin's claim that Hershey's website, advertising, and labeling statements were misleading.

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* The views expressed in this chapter are those of the author's and do not necessarily reflect those of the Government of the District of Columbia, Department of Health.

1 No. 5:12-CV-01826-EJD, 2014 WL 1779805 (N.D. Cal. May 5, 2014).

2 The Northern District of California's "Food Court" enjoys some of the nation's most liberal consumer protection case law and a jury pool of health-conscious consumers. Paul M. Barrett, *California's Food Court: Where Lawyers Never Go Hungry*, Bloomberg Businessweek (Aug. 22, 2013), http://www.businessweek.com/articles/2013-08-22/californias-food-court-where-lawyers-never-go-hungry. From April 2012 to April 2013, the Northern District saw 85 false advertising class action complaints, including 68 complaints filed against food and beverage companies. Anthony J. Anscombe & Mary Beth Buckley, *Jury Still Out on the 'Food Court': An Examination of Food Law Class Actions and the Popularity of the Northern District of California*, Bloomberg BNA (June 28, 2014), http://www.bna.com/jury-still-out-on-the-food-court/. Compare these numbers to California's other three districts, which witnessed a *total* of 85 consumer class actions during the same time frame, of which as few as 12 involved food and beverage products. *Id*.

II. Facts of Case

Defendant Hershey Co. (Hershey) is a well-known confectioner and chocolatier. In recent years, the company expanded its product line to capture a portion of the ever-growing health and wellness market. For example, Hershey added antioxidant claims to many of its "Special" dark chocolates to take advantage of the purported antioxidant properties of cocoa.

Plaintiff Leon Khasin (Khasin) is a California consumer who purchased more than $25 of Hershey's products since 2008. Khasin's products of choice included Hershey's Special Dark Chocolate, Milk Chocolate, Special Dark Kisses, Special Dark Cocoa, Natural Unsweetened Cocoa, and Sugar Free Coolmint IceBreaker Mints.[3] The plaintiff filed a complaint in the Northern District of California alleging that 1) Hershey's antioxidant content and "healthy" claims were misleading, 2) nutrient content and sugar-free claims were made without necessary disclosures, 3) serving sizes were unlawful, 4) polyglycerol polyricinoleic acid was listed as simply "PGPR," and 5) labels failed to disclose the content of vanillin. Khasin alleged that he relied on and was misled by Hershey's labeling.

Before the court issued its order, Hershey filed a motion to, and was granted a partial dismissal of, Khasin's complaint. That order dismissed plaintiff's claims centered on the Magnuson-Moss Warranty Act[4] and the Song-Beverly Act.[5] The surviving causes of action included violations of California's Unfair Competition Law (UCL),[6] the False Advertising Law (FAL),[7] Consumers Legal Remedies Act (CLRA),[8] and unjust enrichment/quasi-contract. Hershey's successful motion for partial summary judgment, the subject of this chapter, removed Khasin's claims that Hershey's website, advertising, and labeling statements misled him, despite Khasin's lack of reliance.

III. Court Ruling

Judge Edward J. Davila granted Hershey's partial motion to dismiss. The court found that plaintiff did not view any advertisements other than product labels and subsequently could not have relied on any off-label advertising of Hershey's products.

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3 Dkt. No. 27 ¶¶ 19, 196.

4 15 U.S.C. § 2301.8 et seq. The Act's primary goals are to make warranties on consumer products more easily understood and enforceable.

5 Cal. Civ. Code § 1792.

6 Cal. Bus. & Prof. Code § 17200 et seq. Commonly known as the "Lemon Law," the Act defines the main obligations of consumer goods manufacturers, covered by implied and express warranties.

7 Cal. Bus. & Prof. Code § 17500 et seq.

8 Cal. Civ. Code § 1750 et seq.

IV. Rationale for Decision

A. Federal Rule of Civil Procedure 23(c)(1)

As a preliminary matter, Judge Davila addressed, and rejected plaintiff's assertion that the court could not rule on any dispositive motions until class certification and the notice period were complete. Hershey argued that a court may rule on a motion for summary judgment before certification. In reaching its determination, the court noted that Federal Rule of Civil Procedure 23(c)(1) requires that class certification be decided "as soon as practicable." Still, the court held that this requirement did not force the court to decide on certification before any other form of early resolution could take place. Judge Davila reasoned that a motion for summary judgment likely protects both parties and the court from needless litigation.

In response, plaintiff raised the "one-way intervention" rule, which restricts the function of a motion for summary judgment so that an absent class member cannot intervene in a class action suit after a class-favoring adjudication has taken place.[9] The court held that the rule did not apply here because the defendant, Hershey, was the party moving for summary judgment. Thus, Hershey effectively waived the right to have notice circulated, knowing that the court's decision would bind the named plaintiffs only. Because class members would not be prejudiced and would remain free to sue Hershey, the court decided it could rule on Hershey's motion for summary judgment before the completion of class certification and notice.

B. Summary Judgment of Website and Advertising Claims

Interestingly, at his own deposition Khasin testified that he had never viewed Hershey's website or other off-label advertising, even though plaintiff's complaint stated that Khasin relied on and was misled by both Hershey's product labels and its off-label information, including advertisements.[10] Consequently, plaintiff's attorneys filed a statement of non-opposition to dismissal of their claims regarding Hershey's website and off-label advertising.[11] Subsequently, the court granted summary judgment as to these claims.

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9 Schwarzschild v. Tse, 69 F.3d 293, 295 (9th Cir. 1995).

10 Dkt. No. 69-1 at 148:22-149:7, 216:4-7, 16-20, 217:3-6, 218:3-6.

11 Dkt. No. 84.

C. Summary Judgment of FAL, CLRA, and Unjust Enrichment Claims

The court granted Hershey's motion for summary judgment as to plaintiff's FAL, CLRA, and unjust enrichment claims. Despite briefing and filing an opposition to Hershey's motion for summary judgment, plaintiff failed to argue that these claims should survive the motion. As such, the court held that failure to oppose the dispositive motion was equivalent to abandoning the claims and likewise granted summary judgment as to plaintiff's FAL, CLRA, and unjust enrichment claims.

D. Summary Judgment of Most UCL Claims

Because Khasin admitted in deposition testimony that he did not rely on any of Hershey's labeling—other than antioxidant claims—Hershey argued that plaintiff's UCL claims should be dismissed due to lack of reliance. Plaintiff did not dispute his lack of reliance, instead countering that reliance need not be demonstrated to bring a UCL claim.

Judge Davila opined that not only does the UCL have basic Article III standing requirements, but it further requires that plaintiffs plead economic injuries. This economic hurdle was added when Proposition 64[12] was enacted in 2004 to restrict UCL standing to those consumers who were actually injured by unscrupulous business practices. This requirement was included in an effort to beat back the waves of suits filed on behalf of litigants who had never actually used the products or services at issue.

To satisfy the injury requirement for a UCL, plaintiffs must demonstrate actual reliance.[13] Plaintiffs must "allege that the defendant's misrepresentations were an immediate cause of the injury-causing conduct."[14] In many cases, the "injury-causing conduct" is simply the decision to purchase a product. Plaintiffs can satisfy the UCL's standing requirement by arguing that they would not have purchased the product but for the misrepresentation.[15]

Despite pleading reliance, Khasin's deposition testimony revealed that he did not actually rely on the vast majority of Hershey's representations at issue. In fact, Khasin testified that he could not remember even looking at Hershey's labels; that he was unconcerned about the use of vanillin and the term "PGPR" on labels; that he did not care about the serving size of mints; and that the use of alkalized cocoa powder did

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12 Cal. Bus. & Prof. Code § 17203. Under Proposition 64, "a private person has standing to sue only if he or she has suffered injury in fact and has lost money or property as a result of such unfair competition." Californians for Disability Rights v. Mervyn's, LLC, 138 P.3d 207, 209 (2006) (citations omitted).

13 Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 322-23 (2011).

14 *In re* Tobacco II Cases, 46 Cal. 4th 298, 328 (2009).

15 Kwikset, 51 Cal. 4th at 330.

not worry him. Thus, owing to plaintiff's own admissions, actual reliance could not be demonstrated and the court granted summary judgment as to those claims.

Khasin did mention that he would like to see certain disclosures on mint containers, such as the admonishment that mints are not a substitute for an entrée, lunch, or meal and that mints are not a low-calorie product.[16] Nevertheless, Khasin stated that he never relied on the lack of either disclaimer when purchasing mints. Subsequently, plaintiff could not establish the requisite reliance under the UCL and summary judgment was granted as to those claims.

In the end, the only claim Khasin viewed and relied on was Hershey's antioxidant seal. He stated that the references to antioxidants on Hershey's confections were a factor in his decision to purchase the chocolates.[17] He also discussed his concern with the use of flavonol[18] and challenged product labels with antioxidant claims, which made it seem as though the antioxidant levels of Hershey's chocolates were similar to those found in tea and fruit. The complaint argues that Hershey's antioxidant claims violate 21 C.F.R. §§ 101.13 and 101.54, which were adopted by California's Sherman Law. The complaint further argues that Hershey's products do not meet the minimum nutritional requirements to make antioxidant claims because there are no recommended daily intake values established for antioxidants.

Because Khasin demonstrated that he actually relied on Hershey's antioxidant claims, the court felt it would be improper to grant summary judgment for this claim.

V. Impact of Decision

From a legal standpoint, *Khasin* reminds plaintiffs' attorneys that their claims may face summary judgment at the earliest stages of litigation, even before class certification or notice. *Khasin* should also serve as a reminder of the "use it or lose it" nature of summary judgment motions. Had plaintiff devoted any portion of his opposition to fending off summary judgment of his FAL, CLRA, and unjust enrichment claims, he may have been able to "use" them. Further, the case cements the UCL requirement that plaintiffs actually rely on potentially misleading claims on packaging and off-label advertising. The enforcement of the "actual reliance" requirement is perhaps the one taste of reason defendants have been craving in the "Food Court."

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16 Dkt. No. 69-1 at 94:2-96:24, 111:3-114:13.

17 Dkt. No. 155:21-156:8, 190:11-13, 208:9-209:14.

18 Flavonols are a flavonoid compound that work as an antioxidant and increase blood flow. Michelle Castillo, CBS News, *available at* http://www.cbsnews.com/news/flavonols-from-chocolate-may-help-patients-with-mild-cognitive-impairment/ (Aug. 14, 2012).

From a practical standpoint, *Khasin* reminds all parties of the hyper-technical and sometimes trivial nature of "Food Court" cases intended to protect consumers. Hershey's antioxidant claims do state the amount of antioxidants in the product, in milligrams.[19] FDA guidance, however, instructs that an antioxidant nutrient content claim can be made only if the nutrients have an established Reference Daily Intake (RDI), as well as recognized antioxidant activity.[20] In order for a label to claim that a food or beverage is a "good source" of any nutrient, the food must contain between 10 and 19 percent of the RDI per serving.[21] While there are RDIs established for several vitamins and minerals, there is no RDI for antioxidants derived from cocoa.

Finally, *Khasin* seems to provide yet another example of expensive, time-consuming litigation, devaluing the intent of consumer protection. Mr. Khasin admitted that he had never visited Hershey's website or viewed any off-label advertising. He similarly was unconcerned over the majority of labeling claims at issue in his complaint. Interestingly, when Mr. Khasin was deposed and asked how he decided to sue Hershey, he responded that his wife, then a secretary at plaintiff's law firm, recommended he talk to an attorney at the office. When asked if he had any desire to sue Hershey before meeting with an attorney, he stated that he did not.

VI. Conclusion

Khasin highlights the importance of demonstrating actual reliance in putative consumer protection class actions.[22] After months of briefing and discovery, a simple conversation (in the form of a deposition) destroyed the vast majority of plaintiff's claims. Perhaps *Khasin's* greatest lessons are not legal, but practical. In a "food fight," neither party should assume that "actual reliance" exists for UCL without evidence. Diligent pursuit of the true facts underlying such allegations is critical for true consumer protection matters.

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19 Oliver Nieburg, *Hershey Antioxidant Labeling Claims Under Spotlight in US Court*, Confectionerynews.com (Nov. 19, 2012).

20 *Id.*

21 *Id.*

22 On March 31, 2015 the U.S. District Court for the Northern District of California, San Jose Division, granted Hershey's Motion for Summary Judgment. Judge Davila noted there was "insufficient evidence that the 'natural source of flavanol antioxidants' statement on the challenged Hershey product was likely to mislead reasonable consumers and that the label statements were therefore unlawful on that basis." The Court reasoned that "not every regulatory violation amounts to an act of consumer fraud."