D077945

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

JOHNSON & JOHNSON ET AL.,
Defendants and Appellants.

APPEAL FROM THE SUPERIOR COURT FOR SAN DIEGO COUNTY
HON. EDDIE STURGEON, JUDGE • NO. 37-2016-00017229-CU-MC-CTL

BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA & THE AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF APPELLANTS

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Introduction

Amici U.S. Chamber of Commerce and American Tort Reform Association agree with appellants' analysis of the Unfair Competition Law (UCL) (Bus. & Prof. Code, §§ 17200 et. seq) and the relevant case law. They believe, for the reasons appellants identify, that the trial court should be reversed.

Amici write separately to focus this court's attention on two aspects of the trial court's ruling which threaten to be particularly destructive to the millions of businesses, from small family-owned shops to large corporations employing thousands, that sell goods in California.

First, the trial court effectively held that sellers of goods in California have a duty to warn users of all conceivable harms that could arise from any possible use of the product being sold – irrespective of how remote, implausible, or obvious those harms might be, or whether additional information (from a necessarily involved expert with legal duties to learn and disclose risks about the product, for example) would be provided to consumers elsewhere. The court even required that sellers include adjectives to color their warnings, no matter if those adjectives repeat information already conveyed. This new, all-in rule, if affirmed, will upend practices in place for decades, exposing businesses to past liabilities they never imagined and future liabilities for what they cannot imagine.

Second, the trial court calculated UCL violations based on every single communication appellants released, rather than the number of consumers appellants advertised to. That approach fails to recognize the reality that for many types of products, including surgical mesh, several communications together make up a single advertisement – neither the seller nor consumer expect that all the relevant information about the product will be in every single communication. From race car sponsorships to internet pop-up ads, some types of marketing communications are brief, while others are more in-depth; they are evaluated by consumers altogether, not individually. The trial court's shotgun approach, however, exponentially magnified damages and gave short shrift to appellants' (and other businesses') due process

rights to face liability only for acts that could reasonably cause someone to be harmed.

Accordingly, amici urge this court to reverse and restore to the UCL – already a statute exceedingly favorable to consumer plaintiffs – the balance the Legislature determined it should have and that businesses have long relied on.

Discussion

I. If Affirmed, the Trial Court's Incorrect Interpretation of the UCL Will Harm Both Businesses and Consumers

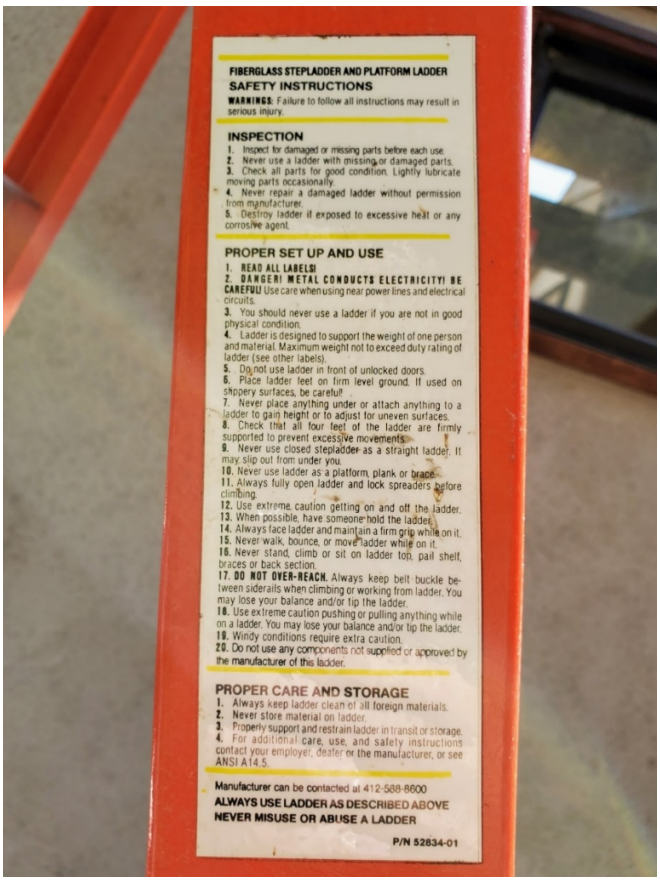
Does Calvin have an actionable UCL claim against the ladder manufacturer here?

The ladder company did not communicate to Calvin that jumping off the top of the ladder would cause him to fall flat on his face. And, unlike in the instant appeal, the ladder company did not have any reason to assume Hobbes is an expert in ladder usage with independent duties to tell Calvin that jumping off holding a helium balloon would cause him to fall flat on his face.

So is there a windfall in the offing for Bill Watterson's precocious adolescent?

Under the trial court's re-envisioning of the UCL, quite possibly. The trial court ignored existing law that the failure to disclose relevant information is not a violation of the UCL unless it is reasonably probable that a significant portion of the targeted audience could reasonably be misled under the circumstances. (*Patricia A. Murray Dental Corp. v. Dentsply Internat., Inc.* (2018) 19 Cal.App.5th 258, 271.) That includes the failure to tell consumers something they can reasonably be expected to know already or unavoidably learn in the future, in this case from their doctors. (See *id.* at pp. 274-275.)

If Calvin's ladder were real, it would probably have a warning label on it similar to this one, from a photo of a ladder for sale at a local hardware store:



The label's 20 warnings advise consumers to take extreme caution; to inspect and lubricate the ladder before use, not to overweight the ladder, and not to use it if they are unfit or it might have been weakened from sunlight or corrosion; not to attempt independent repairs or use it on or against an unstable surface; to only use it when fully opened; not to over-reach with it or sit on the top; to avoid strong wind and unapproved components; if possible to use it with a friend; and never to misuse or abuse it.

The label does not advise, however, that jumping off while holding a helium balloon will cause the user to fall flat on her face. The manufacturer surely concluded that a substantial number of its consumers are reasonably likely to know that already, and thus such a warning is not required here – Calvin's insouciance notwithstanding.

Yet the trial court's ruling at issue in this appeal would not only seem to require exactly that warning, but also warnings for anything else any individual user might think to do – even if a substantial number of reasonable users know or would be told by an expert not to do them. So the ladder company might get sued under the UCL, as construed by the trial court, for failing to include warnings like:

21. Injury may occur if someone or something walks into the ladder and the ladder is occupied.

22. Children should not play a game of hopscotch with the ladder.

23. The ladder is metal, so it will become hot if it is left out in the sun, and if it becomes hot it could burn your feet if you are not wearing shoes, and those injuries to your feet could require medical care, and during that medical care you could obtain an infection, and that infection could require amputation of your feet.

24. Do not attempt to perform tricks with the ladder like you may have seen stuntmen do in films.

Amici are not, of course, trivializing the seriousness of the case at hand, nor the gravity of the decisions doctors, surgeons, and patients must wrestle with every day. The decision whether to use a medical device is far weightier than the decision whether to use a ladder – though it bears mention that the United States is the world leader in ladder-related injuries, with more than 164,000 emergency room-treated injuries and 300 ladder-related deaths every year. (Nick Gromicko & Kenton Shepard, *Ladder Safety*, Internat. Assn. of Certified Home Inspectors <https://bit.ly/3zNQntn> (accessed Sept. 24, 2021).)

But the patent consequences of a medical device decision mean that consumers are going to be more careful, not less, in making that decision, engaging with the expertise of their doctors in deciding what products are best for them. And, in any event, neither the UCL nor the trial court makes any distinction between medical devices and other consumer products for the purpose of this type of lawsuit.

The trial court even deemed some of the warnings given in this case insufficient solely because they did not feature the

court's particular favored adjectives. As the opening brief explains, the court penalized the appellants for including a warning that surgical mesh might lead to "exposure or erosion," because it did not include the phrase "lifelong/recurrent." (See AOB 41-43, 45-46; 26 AA 5616-5617, 5633.) Likewise, a disclosure of "acute and/or chronic pain" was a violation of the UCL because the pain was not expressly described as "debilitating/life changing." (26 AA 5615-5618.)

But neither businesses nor consumers have ever thought to rely on adjectives for the adequacy of warnings. The ladder's warning above, for example, says: "Metal conducts electricity! Be careful! Use care when using near power lines and electrical circuits." It doesn't say: "Metal conducts electricity *very well*! Be *extremely* careful! Use care when using near power lines and electrical circuits *or else you could suffer from lifelong/recurrent or debilitating/life changing injury*." From what the trial court here concluded, though, the ladder maker might well not have bothered to include a warning label at all.

But, of course, that would be silly: while a substantial number of ladder consumers are reasonably likely to know already that metal is very conductive and electrocution can be very dangerous, it's reasonable to make sure they realize the ladder is made of metal and keep the concern in mind. The purportedly missing adjectives here are no different. "Exposure or erosion" of mesh does not need any additional descriptors to be understood by a reasonable consumer as potentially "lifelong/recurrent," given that mesh is implanted inside you.

(See *Erosion*, Oxford English Dictionary <https://bit.ly/2XyXyZ1> (accessed Sept. 24, 2021) [defining "erosion" as "[t]he gradual destruction or diminution of something"].) "Chronic pain" is likewise inherently debilitating or potentially life-changing, at least to a reasonable consumer. (See *Chronic*, Oxford English Dictionary <https://bit.ly/3CkzoAu> (accessed Sept. 24, 2021) [defining "chronic" as "persisting for a long time or constantly recurring"].) As long as sellers use warnings that a reasonable consumer can appreciate – let alone a consumer necessarily acting in concert with an expert like a doctor – it cannot be a violation of the UCL to fail to include specific adjectives subsumed in the disclosure already.

That is what the trial court found here, however. And because the trial court required the appellants to provide warnings for "all risks" (26 AA 5640), and to decorate those warnings with whatever colorizing adjectives it subjectively deemed useful, an affirmance here would render the potential UCL liability to businesses virtually boundless. It would become nearly impossible for a business selling goods in California to comply with the statute in any kind of predictable way.

Worse, the requirement that businesses create over-inclusive, adjective-laden disclosures threatens a new kind of harm to consumers: that the warnings that might genuinely benefit a substantial number of consumers will become lost in the weeds. To see what the trial court's interpretation of the UCL might require in practice for every consumer good, one need only glance at the *39 pages* of tiny-text warnings that could apply to

typical over-the-counter Ibuprofen. (*Ibuprofen – Drug Summary*, Prescribers' Digital Reference <https://bit.ly/2XlYr7r> (accessed Sept. 24, 2021).)

In many ways, this type of logorrheic morass confirms what California's Supreme Court has long acknowledged:

> " 'If we overuse warnings, we invite mass consumer disregard and ultimate contempt for the warning process.' [Citation.] [B]oth common sense and experience suggest that if every report of a possible risk, no matter how speculative, conjectural, or tentative, imposed an affirmative duty to give some warning, a manufacturer would be required to inundate physicians indiscriminately with notice of any and every hint of danger, thereby inevitably diluting the force of any specific warning given. [Citations.]"

(*Finn v. G.D. Searle & Co.* (1984) 35 Cal.3d 691, 701.)

The trial court's incorrect interpretation of the UCL in this case to require "every report of a possible risk" hinged largely on its conclusion that doctors and surgical specialists who implant surgical mesh are not well versed in its risks and complications, and that they would not be reasonably likely to consider or advise their patients of those risks. That conclusion is difficult to understand given the reams of evidence appellants presented about information provided to these professionals, along with their ongoing educational requirements and other duties (see AOB 30-32).

Indeed, continuing education requirements in the medical profession are far more rigorous than in the legal profession: California requires doctors to obtain 50 hours of education every two years (Cal. Code Regs., tit. 16, § 1336), whereas the State Bar

requires lawyers to obtain only 25 hours of education every three years (State Bar Rule 2.72).

And heavier consequences follow the failure of doctors to keep up with the latest developments in their field of specialty than lawyers. The law imposes a duty of care on doctors that includes the duty to provide patients with all material information significant to their choice among treatment options, and the minimal disclosures required in every case include a reasonable explanation of the procedures, their likely success, *and the risks involved in accepting or rejecting each proposed procedure*. (*Flores v. Liu* (2021) 60 Cal.App.5th 278, 290-293, citing *Cobbs v. Grant* (1972) 8 Cal.3d 229, 243-245.)

Yet the trial court concluded that doctors who perform surgical mesh procedures are not reasonably likely to know about the risks of those very procedures – even though surgical mesh has been around since the 1970s and has been used in medical procedures for more than 20 years, so an entire generation of doctors has grown up around the product. (26 AA 5589-5590.) To so conclude, the trial court focused on the fact that doctors do not learn how to implant mesh devices during medical school or residency. (26 AA 5643.) Although many medical journal articles describe the risks and complications of mesh procedures, the court reasoned that "just because an article is in the published literature doesn't mean all doctors have read it," because, after all, doctors " 'are very busy people – it can be difficult for them to stay current with all of the new literature that is published.' " (26 AA 5642-5643.)

This reasoning is puzzling. In the field of law, at least, very few aspects of day-to-day legal practice are taught in law school or tested on the bar exam – yet lawyers go out and learn their specialty and practice it, by and large, with the competence required by their professional duties. And lawyers too are "very busy people," but they are still expected to read cases this court publishes which may be important to their briefs or pleadings. Those who do not risk malpractice and disbarment. It is hard to understand why doctors, with their substantially greater educational requirements and legal duties, should deserve lesser presumptions of diligence and competence than lawyers.

On top of that, a big part of the trial court's solution to the "problem" it identified of incompetent doctors – to require sellers to provide all their highly technical warnings directly to consumers – makes little sense. Reasonable nonexpert consumers cannot be expected to benefit from pages of complicated warnings about technical medical products. If a consumer cannot understand a highly technical warning, it is hardly different from not providing it at all. It may even be worse: medical information without medical training can be a dangerous thing. (See, e.g., Cari Romm, *Doctors Really, Really Want You to Stop Googling Your Symptoms* (Sept. 7, 2016) New York Magazine <https://bit.ly/3tIubiA> (accessed Sept. 24, 2021).)

For comparison's sake, if Westlaw and LexisNexis were required to provide a Shepard-style report of subsequent authorities to litigants every time their attorneys cited a case in a brief, it is hard to imagine that litigants would be able to

understand very much of that report or be meaningfully warned by it. Far more reasonable to expect litigants' lawyers to Shepardize the cases they cite competently and in line with their professional duties – whether or not they learned how to Shepardize in law school – and to then use the results of their efforts to benefit their clients.

Thus, the trial court's central conclusion that the UCL requires sellers to warn consumers and doctors about "all risks" from their products in each communication about those products is incorrect. Reasonable consumers would learn the relevant risks of the procedure in the course of discussing the products with their doctors, who have a legal duty to learn about those risks, warn their patients, and obtain informed consent before performing procedures.

The trial court's all-in disclosure rule instead threatens unpredictable liability to millions of businesses while requiring comically over-expansive product disclosures that will confuse consumers more than elucidate them. Forcing sellers to bury the few useful warnings they conclude consumers genuinely need in a sea of tiny, adjective-laden text is a far less effective way to protect Californians than requiring only those warnings reasonable product users would benefit from.

Not even Calvin would want that.

II. When Advertising Is a Process, UCL Violations Should Flow from the Consumers Advertised to, Not the Number of Communications

The trial court imposed penalties on each of J&J's communications with doctors about surgical mesh, from the initial contact introducing mesh or a mesh device through the instructions for its use, holding that each communication was a separate, punishable failure to disclose. (26 AA 5649-5650.) It also imposed penalties on each communication directed at patients, even though patients do not decide between treatment options on their own, but instead act under the advice of professionals trained in those choices and charged with the obligation to fully explain them.

But when numerous communications are necessarily involved in the use of a product, as with surgical mesh, an advertisement is a *process* that extends over the course of a relationship. That means that a failure to disclose something required in one communication can be cured by disclosing the information in another communication, all as part of the same advertisement. The UCL's goal, after all, is to keep consumers from being misled, and sometimes that requires more than one interaction.

As any consumer who has found a flyer tucked under a windshield wiper or passed a person standing on a street corner sporting a sandwich-board will recognize, not every communication provides every disclosure about a product. A first communication may merely be designed to invite further communications. In other words, information omitted from a

communication that is part of an advertising process is not misleading unless for some reason consumers would expect to learn all pertinent information from that communication, and not from other sources or later communications. (See 26 AA 5635 [noting patient who became interested in a surgical mesh product as the result of a brochure realized that she should ask her doctor about the procedure, and then did ask her doctor].)

The trial court's insistence that California case law establishes that "[c]ourts have consistently held that violations of the UCL or FAL cannot be undone by later disclosures or further explanation" (26 AA 5635-5637), reflects neither reality nor existing law. The cited cases explain either that a nondisclosure cannot be cured by a later disclosure if a reasonable consumer would not see or understand the later disclosure (*Prata v. Superior Court* (2001) 91 Cal.App.4th 1128, 1145; *Brady v. Bayer* (2018) 26 Cal.App.5th 1156, 1159; *Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217, 228), or that a misleading nondisclosure cannot be corrected by a later disclosure when the circumstances make it difficult or impossible for the other party to avoid the transaction. (*Chern v. Bank of America* (1976) 15 Cal.3d 866, 876.) They do not suggest that each and every communication must include all information needed to make a meaningful decision.

It is further settled that it is unreasonable to impose a penalty on each of a number of misrepresentations made for the purpose of solicitating a single customer. The Supreme Court in *People v. Superior Court* (*Jayhill Corp.*) (1973) 9 Cal.3d 283, 289,

thus rejected the argument that each of several communications directed at a single consumer constituted a separate violation, explaining that "it is unreasonable to assume that the Legislature intended to impose a penalty of this magnitude for the solicitation of one potential customer." (*Ibid.*) "Rather," the court clarified, "we believe the Legislature intended that the number of violations is to be determined by the number of persons to whom the misrepresentations were made, and not by the number of separately identifiable misrepresentations involved." (*Ibid.*)

That makes sense – after all, the potential for gain from the allegedly deceptive advertisement accrues from the consumer's ultimate decision to go forward about whether to purchase the product, a decision that is made in light of the totality of communications about it.

The reasoning of *Jayhill* applies here too. Because an advertisement for a complicated product is a process, not an event, an actionable violation of the UCL occurs only if the consumer never receives the salient information before purchasing or using the product. The number of penalties, therefore, should not exceed the number of consumers to whom the advertisements were directed rather than to each and every communication in a chain that forms the overall advertisement.

In fact, the trial court's calculation of penalties based on every single communication, irrespective of the nature of complex advertising or whether the communications ever reached any consumers, violated due process. (*People v. Superior Court*

(*Olson*) (1979) 96 Cal.App.3d 181, 198 [violations must be reasonably related to the gain or the opportunity for gain achieved by the dissemination of the untruthful or deceptive advertisement]; and see *Hale v. Morgan* (1978) 22 Cal.3d 388, 399 ["Courts have consistently assumed that 'oppressive' or 'unreasonable' statutory penalties may be invalidated as violative of due process."].)

In *Olson,* a case involving the calculation of damages for a newspaper advertisement based on the newspaper's circulation, the court explained that because not all newspaper subscribers read all newspaper advertisements, imposing penalties for total newspaper circulation would violate the "due process prohibition against 'oppressive' or 'unreasonable' statutory penalties." (*Olson*, *supra*, 96 Cal.App.3d at p. 198; see *People v. Overstock.com, Inc.* (2017) 12 Cal.App.5th 1064, 1087-1088 [calculating the number of penalties based on the number of Californians who saw the defendant's advertisements, but presumably paid no attention to them, would result in excessive penalties and a violation of due process]; see also *People v. JTH Tax, Inc.* (2013) 212 Cal.App.4th 1219, 1255 [court properly used a fractional multiplier to reduce the number of penalties to reflect the number of publications actually viewed].)

Likewise, here, the trial court's calculation of penalties based on every single communication disregarded the reality of advertising for complex products and violated due process. The trial court should instead have calculated damages based on the number of consumers that reasonably might be expected to

respond to the advertisements, each of whom would have experienced a chain of communications that should be evaluated in toto rather than seriatim.

Conclusion

The decision in this case imposes an unreasonable and unworkable burden on businesses that sell goods in California, exposing them to unpredictable, unlimited liability while at the same time making it more difficult for consumers to appreciate the warnings they genuinely might benefit from. Amici urge this court to reverse.

Respectfully Submitted,

September 27, 2021

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Dated: September 27, 2021

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