Avoiding the Pitfalls of Selling to California Consumers

November 19, 2010
Avoiding the Pitfalls of Selling to California Consumers

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Law & Policy Series

Tab 1: Agenda
Avoiding the Pitfalls of Selling to California Consumers

Agenda

9:00–9:30 a.m. PT  
Registration and Networking Breakfast

9:30–11:00 a.m. PT  
Presentation and Questions

- Introduction
- Gift cards
- “Made in USA” claims (Bus. & Prof. Code § 17533.7)
- “Slack Fill” (Bus. & Prof. Code § 12606.2)
- Advertising of sale prices/free offers (Bus. & Prof. Code §§ 17501, 17537, 17537.11)
- Proposition 65 (Health & Safety Code §§ 25249.5 et seq.)
- Sales below cost (Bus. & Prof. Code § 17043)
- Resale price maintenance (Bus. & Prof. Code § 16720)
- Questions & Answers
Arnold & Porter Law & Policy Series

Tab 2: Presentation Slides
Avoiding the Pitfalls of Selling to California Consumers

Introduction

- Seven different ways California laws can trip up unsuspecting companies:
  1. Gift cards (Civil Code § 1749.5)
  2. "Made in USA" claims (Bus. & Prof. Code § 17533.7)
  3. "Slack fill" (Bus. & Prof. Code § 12606.2)
  4. Advertising of sale prices/free offers (Bus. & Prof. Code §§ 17501, 17537, 17537.11)
  5. Proposition 65 (Health & Safety Code §§ 25249.5. et seq.)
  6. Sales below cost (Bus. & Prof. Code § 17043)
  7. Resale price maintenance (Bus. & Prof. Code § 16720)

- Today’s program is designed to help you:
  1. Avoid getting sued
  2. Successfully defend if you do get sued
Introduction (cont.)

- The Unfair Competition Law: the vehicle of choice for class action plaintiffs’ lawyers in California
- First five of the statutes we’ll discuss do not provide for private rights of action
- But in California, that is not an obstacle to suing for violations of these—or any other—statutes
- Because the UCL prohibits any “unlawful” conduct, under the UCL a violation of any statute will serve as the predicate for a UCL violation

Introduction (cont.)

- CA Supreme Court poised to decide critical issue affecting who can sue under the UCL—the Kwikset Case
- UCL requires every private plaintiff to show that he or she “lost money or property” as a result of the violation
  - Plaintiffs: We “lost” money simply because we expended money to buy the product
  - Defendants: No “lost” money because plaintiffs received a product equal in value to amount paid
- Supreme Court’s pending decision will dramatically expand or contract the number of UCL class actions filed under the statutes we’ll discuss today
Gift Cards and “Made in USA” Claims

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Gift Cards (Civil Code § 1749.5)
What Violates The Law?

- The Key Statutory Language:
  “Any gift certificate [including gift cards] with a cash value of less than ten dollars ($10) is redeemable for cash”

- Violations will usually be based on:
  - Statement on back of card that card may not be redeemed for cash
  - Individual store clerk’s refusal to give cash back when value of card is below $10

Compliance Measures

- Language on back of card should say “card may not be redeemed for cash unless required by law”
  - With limited real estate on back of card, unrealistic to require a nationwide vendor to identify each state’s legal requirements

- Store personnel should be trained to provide cash back when balance falls below $10
  - To ensure awareness of requirement, consider posters in staff rooms or company-wide memos
  - Also consider implementing a designated key on cash register to deal with these transactions
Defending Gift Card Lawsuits

- No standing to sue because no loss of money or property (Kwikset issue)
- Even if there is standing to sue, no monetary relief because restitution is only monetary relief available, and restitution is limited to “the excess of what the plaintiff gave the defendant over the value of what the plaintiff received”
- Class certification issues (e.g., if violation is based on store clerk’s refusal to redeem, certification would be inappropriate because individual issues regarding violation would predominate over common issues)

One Final Point

- In California, gift certificates and cards cannot expire
"Made in USA" Claims (Bus. & Prof. Code § 17533.7)

What is a Violation?

- Statute prohibits "Made in USA" label when
  - Any "article, unit or part" of merchandise
  - Is "entirely or substantially made, manufactured or produced outside of the United States"

- California courts have strictly construed the statute so that just a single foreign part can be a violation
  - Kwikset: Locksets that were assembled in US from entirely domestic components except a few screws and pins held to violate statute

- Conflict with FTC standard, which allows a "negligible" amount of foreign content
Compliance

- Make claim with extreme care

- Consider alternatives:
  - Made in USA of Primarily Domestic Components
  - Made in USA/Partially Assembled in [foreign country]
  - Assembled in USA from Primarily Domestic Components

- Don’t make claim

Defending “Made in USA” Lawsuits

- No standing to sue because no loss of money or property (Kwikset issue)

- Even if there is standing to sue, no monetary relief available because consumer got full value for his or her money (restitution issue)

- Class certification issues (e.g., individual issues regarding whether the “Made in USA” designation influenced the consumer’s purchase will predominate over common issues, rendering certification inappropriate)
“Slack Fill” & Advertising of Sale Prices or Free Offers

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"Slack Fill" (Bus. & Prof. Code §§ 12606 and 12606.2)
California Laws Regulating “Slack Fill”

- Two Statutes:
  - General: Bus. & Prof. Code § 12606
  - Food Containers: Bus. & Prof. Code § 12606.2

- Amendments to the law have decreased the number of private lawsuits, but District Attorneys have shown a renewed interest in prosecuting.

- Guiding Concept: Containers shall not “be made, formed, or filled as to be misleading,” which is achieved by regulating “slack fill”.

What is “Slack Fill”?

- The difference between the actual container capacity and product volume contained within.

When is the law violated?

- Containers with false bottoms, sidewalls, and lids. Some DA's are taking the position that these are per se violations.

- Containers with “nonfunctional slack fill,” which is slack fill that does not fit into any of the listed safe harbors (15 for general containers; 6 for food).
“Slack Fill” Safe Harbors

- What are the safe harbors? § 12606(b)(1)-(15)
  1. Protection of the contents*
  2. Requirements of the machines*
  3. Unavoidable product settling*
  4. Space for mandatory labeling*
  5. Container has value*
  6. Inability to increase level of fill or reduce size of package*
  7. “Reasonable relationship”
  8. Representation of actual size
  9. Necessary space for mixing
 10. Delivery device
 11. Component kit
 12. Tester or display units
 13. Holiday and gift packages
 14. Free sample or gift
 15. Hardware and software

*Also apply to food containers under § 12606.2(c), which has an additional exception for “packaging that plays a special function”

Avoiding “Slack Fill” Liability?

- Make contents fully visible, when possible
- Fill containers to at least 70-80%
- Maintain documentation that demonstrates a lack of fraudulent or deceptive purpose in package design
- Pre-market review with the Attorney General’s office
- Track consumer complaints to spot problems early
Advertising of Sale Prices or Free Offers
(Bus. & Prof. Code §§ 17501, 17537, 17537.11)

California Law Regulating the Advertising of “Former” and Sale Prices

- Regulated by the False Advertising Law
  - FAL has a similar structure to the Unfair Competition Law, but a limited focus on deceptive advertising

- §17501 covers statements of former price in ads
  - Can only claim that a price was a former price if that former price was the prevailing market price—for the same good, in the same locality—during the three months immediately preceding the advertisement
Other Guidance on “Former” Prices in Advertisements

- The CA Code of Regulations states that claims of “former price” include, but are not limited to:
  - “Formerly—,” “regularly—,” “usually—,” “originally—,” “reduced from . . .,” “was . . . now . . .,” “...% off.” (Title 4, Cal. Code Regulations, § 1301)

- FTC Guidance:
  - Product in question does not have to have been actually sold at former price; active and open offer is sufficient to qualify
  - Manufacturer’s suggested or list prices do not automatically qualify as “former” prices, unless substantial sales are made in the advertiser’s trade area at that price

Avoiding “Former”/ Sale Price Liability?

- Survey prices at competitor and comparable merchants to document prevailing market prices
- Conduct periodic audits of own prices to ensure compliance with statute
California Laws Regulating the Advertising of Free Offers

- Two Statutes:
  - Coupons: Bus. & Prof. Code § 17537.11
  - Prizes and Gifts: Bus. & Prof. Code § 17537

- FTC has also issued advisory guidance on “free” offers and similar representations
  - To guarantee “that the consuming public is not deceived by offers of nonexistent bargains or bargains that will be misunderstood”

California Laws Regulating the Advertising of Free Offers (cont.)

- Coupons—§ 17537.11:
  - Unlawful to offer a “free,” “gift,” or “prize” coupon if the recipient must pay or buy something in order to obtain or use the coupon and the coupon offeror or made the majority of their sales in the previous year in connection with similar coupons

- Prizes—§ 17537:
  - Unlawful to use the term “prize” or “gift” in a manner that is untrue or misleading
  - Unlawful to notify a person as part of an advertising plan that they have won a prize, if receipt is conditioned on a payment or purchase
California Laws Regulating the Advertising of Free/Gift Offers

- Gifts: § 17537:
  - Unlawful to notify a person that they will receive a gift, if receipt is conditioned on a payment or purchase, and:
    - Shipping cost exceeds average or actual cost;
    - Handling charge is unreasonable or exceeds either the average or actual cost;
    - Required purchase otherwise available for a lower price;
    - Majority of offeree’s sales of the required items for purchase during the preceding year, through the same marketing channel in which gift is offered, were made in conjunction with a gift offer; or
      - Exception for general merchandise retailers selling goods or services through mail order that are special and for a limited time.
    - Untrue representation of a special selection

FTC Guidance on the Advertising of Free Offers

- Language that triggers concern: “Free,” “Buy 1-Get-1 Free,” “2-For-1 Sale,” “X% off with the purchase of 2,” “Half Price Sale,” “½ Off,” etc.

- When a purchaser is told an item is “Free” if another article is purchased, that suggests he is paying nothing for the article and no more than regular price for the other

  - Regular price is the price at which the seller has openly and actively sold the product or service in the same market or area for a reasonably substantial period of time where the “free” offer is made
FTC Guidance on the Advertising of Free Offers

- Frequency: “Free” offers should (i) be separated by at least 30 days; (ii) should not be advertised more than three times, or for more than 6 months, in a 12 month period; and (iii) should not account for more than 50% of total volumes of sales for that product in the area.

Avoiding “Free/Gift” Offer Liability?

- Make “free” product independently available for a price to help establish that its value is not priced into the required-purchase product.
- Reduce the frequency and term of the “free” offer; do not let it become the majority of sales.
- Maintain documentation regarding the price history of the required-purchase and “free” products.
Proposition 65

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Proposition 65 (Health & Safety Code §§ 25249.5 et seq.)
WARNING:
This Presentation Contains Chemicals Known to the State of California to Cause Cancer and Birth Defects or Other Reproductive Harm.

Proposition 65’s Major Elements

I. The Lists of Chemicals
II. The Warning Provision
III. The Discharge Prohibition
The Lists and the Levels

~519 Carcinogens
No Significant Risk ($1 \times 10^{-5}$)

~309 Reproductive Toxicants
No Observable Effect Level $\div 1000$

Exposure, Not Concentration!

The Scarlet Letter

**WARNING:** This product contains a chemical known to the State of California to cause cancer.

**WARNING:** This product contains a chemical known to the State of California to cause birth defects or other reproductive harm.
Few Limitations

- Federal Preemption
- 12-Month Grace Period After Listing
- Companies Under 10 Employees
- Occupational (HazComm Standard)
- Prescription Drug Presumption
- Naturally Occurring in Food

Unusual Features of Proposition 65

- Private citizens, the Attorney General, and local District Attorneys may sue
- No showing of actual harm is required
- Burden of proof is mainly on the defendant
- Applies to very small levels of chemicals
- Penalty is $2,500 per “violation” per day
- Very few standards; mostly set by settlements
Some Products That Have Been Targets of Proposition 65 Litigation

- Smokeless tobacco
- Leaded crystal
- China
- Wine
- Power Tools
- Nail Polish
- Wite-Out®
- Flip-flops
- Backpacks
- Jet skis
- Potato chips
- Plastic gloves
- Diaper Pail Deodorizers
- Dandruff Shampoo
- Faucets
- French Fries
- Paint
- Bottled Water
- Grilled Chicken
- Carburetor Cleaner
- Room Fresheners
- Paint Strippers
- Calcium Supplements
- Multivitamins

Most Litigated Chemicals

- Lead is almost half the cases
- Heavy metals are over 60 percent of cases
- Some hotly litigated cases involve less common chemicals:
  - Acrylamide in snack foods
  - Mercury in canned tuna
## Prop 65 Settlements

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Below-Cost Pricing and Resale Price Maintenance

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Below-Cost Pricing (Bus. & Prof. Code § 17043)
The Problem

- California is diverging from federal law in a way that creates a risk of liability for low (yet profitable) prices.
- Under the federal antitrust laws:
  - The singular goal is to preserve competition for the benefit of consumers, not competitors; and therefore
  - Low prices are something to encourage, not chill, even if motivated by an intent to eliminate a competitor.
    
    “Low prices benefit consumers regardless of how those prices are set.”
    

- California debates whether the UPA’s below-cost statute:
  - Shares that same, singular focus, or instead
  - Makes protecting competitors from low prices an additional goal.

The Federal Standard

- A price is not unlawful for being too low unless:
  - The price is below some measure of cost, and
  - A reasonable prospect or dangerous probability exists for recouping the resulting losses through subsequent overcharges.

- Both elements are necessary to establish harm to competition:
  - Above Cost: “[T]he exclusionary effect . . . reflects the lower cost structure of the alleged predator, and so represents competition on the merits . . .* Brooke Group, 509 U.S. at 223.
  - No Recoupment: “[P]redatory pricing produces lower . . . prices, and consumer welfare is enhanced. [U]nsuccessful predation is in general a boon to consumers.” *Id.* at 224.
Federal-Law Advice:

- The standard is difficult to establish
  

- You can have confidence to lower your price . . .
  
  – As low as your costs, and
  
  – Even lower where you are unlikely to:
    
    • obtain significant market share (e.g., due to the limited scope or extent of the reduction), or
    
    • hold significant market share if you subsequently raise your prices to supracompetitive levels

California Law

- Bus. & Prof. Code § 17043 specifically includes below-cost pricing among its list of unfair trade practices
  
  “It is unlawful for any person engaged in business within this State to sell any article or product at less than the cost thereof to such vendor . . . for the purpose of injuring competitors or destroying competition.”

- Bus. & Prof. Code §§ 17026 & 17029 provide a California-specific definition for below cost
**Bay Guardian: No Recoupment Requirement**

  - Proof of likely recoupment is unnecessary under the UPA
  - Instead, an intent to injure the plaintiff competitor is enough
  - Lost sales due to the predation is sufficient to presume intent and shift the burden of proof to the defendant
- The court reasoned that the UPA applies a “different focus” than the federal antitrust laws because it:
  - Contains plain language making clear that a violation arises whenever a firm acts to injure a competitor, not just competition
  - Reflects a concern “not only with the maintenance of competition, but with the maintenance of fair and honest competition”
  - “Protect[s] comparatively smaller enterprises from predatory pricing schemes of larger competitors”

**Measures of Below Cost**

**Federal Law: Avg. Variable Cost**
- AVC estimates the marginal cost of production
- It is commonly calculated for pricing decisions
- It is relatively easy for a business to know
- Its use as the safe harbor protects price cutting down to the cost of producing an additional unit and thus encourages competition

**State Law: Avg. Total Cost**
- ATC is a fully loaded cost of production
- It is not used in pricing decisions
- It is difficult to calculate due to subjective allocation issues
- Its use as the safe harbor subjects low prices to legal challenge even where profitable
California-Law Advice:

- California’s standard may be so low that antitrust suits become a tool for keeping prices high
  - Low-margin businesses risk of unknowingly pricing below total cost
  - Inefficient competitors who lose sales need show little else to sue
- To avoid all risk of liability businesses need to:
  - Keep prices well above marginal cost, and
  - Do so in an amount that estimates per unit fixed costs
- Short of that:
  - Antitrust compliance programs and vigilance are important
  - They can help eliminate competitive hyperbole—e.g., “let’s kill ’em”
  - This may help tip the balance in a case that will turn on whether the jury believed a firm had an intent to harm a competitor

Resale Price Maintenance (Bus. & Prof. Code § 16720)
The Issue

- Resale Price Maintenance
  Acts a manufacturer takes to influence the minimum price that its customers charge to their customers
- When achieved by an agreement fixing a reseller’s price:
  - It is a restraint of trade, and
  - The question arises whether it is “unreasonable”

The Controversy over Reasonableness

- RPM can simultaneously:
  - Reduce intra-brand price competition (that among sellers of the same brand), and
  - Stimulate inter-brand competition (that among sellers of different brands)
- Treatment of RPM agreements varies according to perspectives on:
  - The relative value of each form of competition (intra-brand price competition vs. inter-brand competition), and
  - The probable competitive effects (never helpful vs. rarely harmful)
The Problem

- California may not follow changes in how federal law approaches the “reasonableness” inquiry
- A recent U.S. Supreme Court recent decision:
  - Discarded a century-old presumption that RPM agreements are unreasonable restraints of trade, and
  - Replaced it with a rule requiring a factual showing of a net harm to competition (and skepticism about such harm)
    \( \text{Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007)} \)
- California has not yet followed suit

California Law: Will Leegin Apply?

- Like federal law:
  - California law contains no express statutory prohibition on RPM agreements
  - It contains a general prohibition on "restrictions in trade or commerce"
- Prior to Leegin:
  - California courts followed the federal presumption
  - They interpreted the Cartwright Act’s general rule to condemn RPM agreements as per se unreasonable
    \( \text{Maitland v. Burckle, 572 P.2d 1142 (1979)} \)
- \text{Leegin} is instructive, not binding, on whether California courts will continue to apply the presumption
State Enforcers’ View: *Leegin* should not apply.

- Both federal and state statutes are similar in that they generally prohibit unreasonable restraints of trade.
- But the Cartwright Act requires a different result because it goes further to specifically prohibit agreements:
  - To “increase the price of merchandise or any commodity,”
  - “Not to sell . . . any article . . . below a . . . fixed value,”
  - “To keep the price of [an] article . . . at a fixed figure,”
  - To “establish or fix the price of any article,” and
  - To “unite interests . . . that may have connected with the sale . . . of any . . . article . . . [such that] its price might in any manner be affected.”

State Enforcers’ *DermaQuest* Action

- The State AG’s office is collecting RPM agreements and selecting strong cases for enforcement.
- Its first target was DermaQuest, which required distributors to agree to sell at or above MSRP.
- Last February, the State AG charged DermaQuest with vertical price-fixing in *per se* violation of the Cartwright Act.
- The AG obtained a consent decree enjoining the program and imposing civil penalties, attorneys fees and costs.
California-Law Advice

- Be (or find) a trailblazer, or
- Stick with the tried-and-true strategies for complying with federal law before Leegin
  - Consider whether non-price restraints—exclusive territories, minimum advertised price (MAP)—would be effective substitutes for RPM agreements
  - Maintain resale price without an “agreement” by unilaterally announcing MSRP and terminating non-complying dealers (i.e., implement a Colgate program).
  - Sell on a bona fide consignment arrangement

Questions?

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Arnold & Porter
Law & Policy Series

Tab 3: 17200 Resource Packet
Tab 5: Speaker Biographies
James F. Speyer
Partner

James Speyer is a partner in the firm’s Los Angeles office. His practice focuses on antitrust and other complex civil litigation, including product liability, unfair competition, and franchise law. Mr. Speyer has an extensive background in all phases of civil trial practice and appeals, in federal and state courts in California and throughout the country. He recently led the joint defense team in a set of antitrust class actions seeking billions of dollars in damages.

From 1991 to 2005, Mr. Speyer was an attorney at Arnold & Porter LLP and practiced in the antitrust and trade regulation group. Prior to rejoining Arnold & Porter, Mr. Speyer served as Chair of the litigation practice group at Heller Ehrman’s Los Angeles office.

Mr. Speyer received his law degree from George Washington University Law School, where he was a member of the Law Review.

Representative Matters

- Defends world's largest live music company in In re Live Concert Antitrust Litigation-a multidistrict litigation (MDL) proceeding consisting of 22 class actions alleging that defendant monopolized the rock concert industry.

- Represented one of the nation's largest consumer products companies in several statewide consumer class actions alleging price-fixing in violation of Sherman Act § 1.

- Represents client in proceedings before the California Supreme Court that are expected to result in a seminal ruling concerning the impact of a voter initiative (Proposition 64) on class actions under California's Unfair Competition Law.

- Defended tobacco company in statewide consumer class action seeking to invalidate on antitrust grounds the landmark Master Settlement Agreement between 46 attorneys general and the major tobacco companies.

- Defended weapons manufacturer in product liability/wrongful death lawsuit.

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Practice Areas
Antitrust/Competition
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Business Litigation
Consumer Protection and Advertising

Education
JD, The George Washington University Law School, 1985
BA in History, Philosophy, Phi Beta Kappa, Williams College, 1981

Admissions
California

arnoldporter.com
- Served as lead counsel for the tobacco industry in healthcare reimbursement and unfair competition lawsuits brought by the State of California and 19 California cities and counties.
- Served as lead counsel for the lead industry in class action brought by California public entities seeking abatement of all lead-painted properties in California.
- Represented one of the nation’s largest distributors of electrical products in federal antitrust lawsuit alleging group boycott and attempted monopolization claims.
- Represented major convenience store franchisor in numerous antitrust and unfair competition matters

**Professional and Community Activities**

- Member, American Bar Association
- Member, California State Bar
- Member, Los Angeles County Bar
- Member, Los Angeles Superior Court Bench/Bar Committee

**Blogs**


Articles


Advisories

- "Supreme Court Adopts "Nerve Center Test" to Determine a Company's "Principal Place of Business"." Mar. 2010.
- "CA Supreme Court Relaxes Standing and Liability Requirements Under CA's Unfair Competition Law." May. 2009.
Angel A. Garganta
Partner

Angel A. Garganta represents businesses, including financial institutions, manufacturers, and service companies, in a broad range of unfair business practice/consumer class actions and complex commercial disputes. He is a recognized authority on California's consumer protection laws and uses his experience to achieve cost-effective, efficient results for his clients through the early and strategic use of motions to dispose of cases or to position them for favorable settlements.

Mr. Garganta clerked for the Honorable Marilyn Hall Patel, United States District Judge for the Northern District of California. He has served as President of the San Francisco Bank Attorneys Association, on the Board of Directors of the Bar Association of San Francisco, on the Executive Committee of its Litigation Section, and on the Editorial Advisory Board of California Forms of Pleading and Practice (Matthew Bender, ed.). Mr. Garganta has repeatedly been recognized as a Northern California "Super Lawyer" by his peers and Law & Politics and San Francisco magazines. He was Associate Editor of the California Law Review at University of California Berkeley School of Law (Boalt Hall) and is fluent in Spanish and French.

Representative Matters

Consumer Products and Services

- Defending a national restaurant system in multiple consumer class actions nationally alleging false advertising about the nutritional content of its menu items
- Defending a yogurt manufacturer in multiple consumer class actions nationally alleging false advertising about the health benefits of its probiotic products
- Defending a manufacturer of Bluetooth headsets in federal multidistrict false advertising and unfair business practices class actions alleging failure to warn consumers of hearing loss risk

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Practice Areas
Antitrust/Competition
Class Actions
Litigation
Financial Services
Consumer Protection and Advertising

Education
JD, Order of the Coif, University of California, Berkeley School of Law (Boalt Hall), 1992
MA, Andrew W. Mellon Fellow, University of California, Berkeley, 1987
BA, magna cum laude, Princeton University, 1984

Admissions
California
US District Court for the District of Arizona
US District Court for the Central District of California
US District Court for the Northern District of California
US District Court for the Southern District of California
US Court of Appeals for the Sixth Circuit
US Court of Appeals for the Ninth Circuit

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Defending a national retailer of nutritional supplements in multiple consumer fraud and unfair business practices class actions concerning product quality

Defending a printer manufacturer in a private attorney general action alleging misleading print speed ratings

Defending a prescription drug manufacturer in a products liability class action alleging misleading labeling

Defending a major real estate management company in several tenant class actions challenging its application and security deposit practices

Representing a major French food and beverage producer as plaintiff in a multijurisdictional international commercial litigation against its Chinese joint venture partners

**Financial Services**

Defending a national motor vehicle finance company in a nationwide class action alleging false advertising and unfair business practices regarding its extended service plans

Defending a major national bank in an unfair business practices class action alleging violation of consumer privacy rights

Representing a California state agency as plaintiff in foreclosure and receivership proceedings against a defaulting borrower, recovering nearly US$17 million

Defeating a multimillion-dollar lender-liability cross-claim on summary judgment

Achieving a no-payment settlement for a major national bank in a mortgage lending assignee liability and unfair business practices class action

Defending a major bank in an unfair business practices and fraud class action, resulting in a favorable settlement after fraud claim was dismissed

**Rankings**

*Northern California Super Lawyers* 2004-Present for Business Litigation, Civil Litigation Defense, Consumer Law, and Banking

**Professional and Community Activities**

Bar Association of San Francisco

- Judiciary Committee (past)
- Board of Directors (past)
- Executive Committee, Litigation Section (past)
- Board of Directors, Barristers Club (past)

Editorial Advisory Board Member, California Forms of Pleading and Practice (Matthew Bender)

Board of Directors, Northern District of California Practice Program

President, San Francisco Bank Attorneys Association
Consumer Financial Services Committee, State Bar of California

Articles


Presentations


Angel A. Garganta. "Panelist, Person Most Knowledgeable Depositions (Rule 30 (b)(6); CCP 2025(d)): Are There Really Any Rules?" The Bar Association of San Francisco, November 2004.

Angel A. Garganta. "Speaker, The SB1 Privacy Litigation: Where is it Going and Where Do We Go From Here?" MCLE Program sponsored by the State Bar of California, the California Bankers Association and the San Francisco Bank Attorneys Association, October 2004.


Angel A. Garganta. "Speaker, Overview of Recent Developments in Case Law Under California's Section 17200" Bay Area Association of General Counsel, August 2000.

Advisories


"CA Supreme Court Relaxes Standing and Liability Requirements Under CA's Unfair Competition Law." May. 2009.

"Reliance Is Not Enough: California Consumers Must Lose Money or Property to Sue." Mar. 2009.

"CA Supreme Court Rules Consumers Need Actual Injury for CLRA Claim." Feb. 2009.
Trenton H. Norris
Partner

Trent Norris, head of Arnold & Porter's San Francisco office, litigates complex scientific and technical disputes in the areas of consumer protection, product liability, and environmental law.

Mr. Norris' clients are primarily manufacturers, distributors, and retailers of everyday products. His cases have involved diverse products, technologies, and industries, including hearing aids, dietary supplements, cosmetics, restaurant meals, grilled meat, water meters, dandruff shampoo, power tools, medical devices, soft drinks, crystal glassware, snack foods, plumbing valves, vaccines, home electronics, paints, motor vehicles, pharmaceuticals, and batteries, to name a few. He works actively with trade associations and joint defense groups in many of these industries.

A significant portion of Mr. Norris' practice is devoted to advising and defending companies in regards to California's unique toxics and labeling law, Proposition 65, and California's expansive consumer protection laws. He has been a leader in the effort to reform the standing requirements of these laws.


Representative Matters

- Represented major food manufacturer in regulatory proceedings and litigation brought by California attorney general and citizens groups to require Proposition 65 warnings on snack foods
- Represents 17 manufacturers and retailers of multivitamins in Proposition 65 litigation by the California Attorney General and multiple District Attorneys
- Represents major restaurant system in two nationwide and four state class actions alleging inaccuracies in nutritional information provided on menus

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• Represents major manufacturer of yogurt products in purported nationwide class action alleging false advertising regarding the benefits of the products

• Represented nine manufacturers and retailers of red yeast rice dietary supplements regarding allegations that the products require warnings under Proposition 65 and related laws

• Represents six national restaurant systems against claims by animal rights advocacy group that Proposition 65 warnings are required on grilled chicken products

• Represented major manufacturer of Bluetooth wireless headsets in defending multidistrict litigation alleging that warnings are required for noise-induced hearing loss

• Advises numerous dietary supplement manufacturers and retailers concerning allegations of non-compliance with California consumer laws and Proposition 65

• Represented global beverage company regarding allegations that soft drink bottles illegally imported and sold in California by others require a warning under Proposition 65

• Represented 21 manufacturers and retailers of progesterone creams regarding allegations that they require warnings under California consumer laws and Proposition 65, resulting in published decision affirming the reform of California's consumer protection laws

• Represented several manufacturers and retailers of ginseng supplements in defending claims that ingredient lists were inaccurate as a result of change in federal law

• Represented manufacturers and retailers of kava supplements in defending class action claiming that the products require warnings

• Represented manufacturer of vaccines in litigation alleging that preservatives used in childhood vaccines result in autism, resulting in published decision upholding treatment of prescription medications under Proposition 65

Awards

• Barrister of the Year, Bar Association of San Francisco 1998

Rankings

• Named to Daily Journal's "Top 100: California's Leading Attorneys of 2010"

• Chambers USA: America's Leading Lawyers for Business 2005-2010 for Environment

• Northern California Super Lawyers 2004-2010 for Consumer Law, Intellectual Property Litigation, and Environmental

• The International Who's Who of Environment Lawyers 2009

• Who’s Who Legal: California 2009 for Environment

• Selected as one of California's "20 Under 40" Lawyers, Daily Journal Extra, 2004
Professional and Community Activities

- Advisory Board, Prop 65 Clearinghouse (2004-present; Chair (2006))
- Alumni Advisory Board, Harvard Environmental Law Society
- American Bar Association
- Bar Association of San Francisco
- Bay Area Lawyers for Individual Freedom (BALIF)
- Board of Directors, The Peter M. Cicchino Social Justice Foundation
- Chair, Barristers Club of San Francisco's committees on intellectual property, community education and volunteer legal services (past)
- Chair, Editorial Advisory Board, Prop 65 News (2001-2004)
- Editorial Board, Association of Business Trial Lawyers (Northern California) Report

Blogs


Books


Articles


Trenton H. Norris
Arnold & Porter LLP


Presentations


Trenton H. Norris. "Business & Professions Code Section 17200: Has Proposition 64 Changed Everything?" Faculty member of full-day seminar, Oakland, California (July 20, 2005).


Advisories


"CA Supreme Court Relaxes Standing and Liability Requirements Under CA's Unfair Competition Law." May. 2009.


"Reliance Is Not Enough: California Consumers Must Lose Money or Property to Sue." Mar. 2009.
- "CA Supreme Court Rules Consumers Need Actual Injury for CLRA Claim." Feb. 2009.

Multimedia

Eric Shapland
Counsel

Eric Shapland is a member of Arnold & Porter LLP’s antitrust/competition practice group. He has extensive background in technological tying, bundled rebates, failure-to-assist, standing, and immunity doctrines. In antitrust cases involving tobacco, software, and construction, Mr. Shapland has helped develop strategies for trial, motion practice and class certification proceedings. In his general practice, Mr. Shapland has tried and arbitrated several cases, led expert disclosure and discovery, and briefed and argued several motions and appeals.

Representative Matters

- Represented tobacco company in its defense against claims based on the industry-wide settlement with 46 states over tobacco related healthcare costs. In the latest challenge, the Ninth Circuit affirmed dismissal of all claims by declaring that the master settlement agreement and related state statutes do not violate the antitrust laws. Sanders v. Brown, No. 05-15676 (9th Cir. Sept. 26, 2007).

- Represented Microsoft Corporation in its defense against claims brought by Sun Microsystems, Inc. as follow-on litigation to the US Department of Justice’s antitrust action against Microsoft.

- Represented California Common Cause in support of California’s effort to enforce its campaign contribution disclosure requirements against Indian tribes. With Common Cause’s help, California secured the first state supreme court of appeal decision holding that a tribe was subject to suit in the absence of tribal or Congressional consent. Agua Caliente Band of Cahuilla Indians v. Superior Court, No. S123832 (Cal. Sup. Ct. Dec. 21, 2006).

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Practice Areas
Antitrust/Competition

Education
JD, University of California, Los Angeles School of Law, 1997
BA in History, University of California, Davis, 1993

Admissions
California
US Court of Appeals for the Ninth Circuit
US District Courts for the Northern, Central, and Eastern Districts of California
Professional and Community Activities

- Member, American Bar Association (Litigation and Antitrust Sections)
- Member, Bar Association of Los Angeles County (Antitrust Section)
- Member, State Bar of California

Advisories

Arnold & Porter Law & Policy Series

Tab 6: Consumer Protection and Advertising Law Brochure
Protecting consumer brands requires a multidisciplinary legal team
For consumer product and services companies, brand value is paramount. Creating and maintaining that value takes significant time, resources, and diligence. Threats abound—whether from consumer lawsuits, competitor challenges, activist pressures, or regulatory scrutiny. Spotting these threats and protecting your brands against them require a multidisciplinary legal team.

Claims that a company makes about its product or service—even unintended claims that consumers perceive—can place the product or service in the sights of activist groups, plaintiffs’ lawyers, competitors, or state and federal regulators. Indeed, a single claim can prompt all of these groups. Other interactions with consumers also can run afoul of regulatory issues involving data collection, security, and privacy and can trigger claims relating to spamming, pretexting, telemarketing, and credit and debt collection.

A full service consumer protection practice that efficiently integrates multiple practices, jurisdictions, and forums offers consumer product companies:

- Close coordination of regulatory and litigation matters with a view toward preventing future issues
- Efficient handling of multiforum matters ranging from government investigations to activist litigation to competitor challenges
- Careful consideration of requirements outside the US
Helping Brands Succeed

Arnold & Porter LLP is committed to serving the consumer products/services sector and has for decades provided high-quality risk reduction counseling, effective guidance in connection with federal and state regulatory investigations, and vigorous representation in consumer and competitor litigation matters.

Counseling/Risk Reduction

In some cases, a small investment in up-front preventive measures can save companies millions of dollars. Whether a company seeks to forestall federal or state regulatory action, litigation by a competitor, or litigation by an activist group, Arnold & Porter can work with you with the aim of preventing problems before they develop.

The firm’s consumer protection and advertising lawyers can assist clients in establishing compliance guidelines and internal controls for claim substantiation and to identify potential product recall issues, including product safety issues, at the earliest opportunity. And our depth and experience often enable us to provide a “second opinion” on a difficult issue in an efficient and timely manner. We pride ourselves on working with client business teams to develop legal solutions that minimize risk while still allowing successful brand promotion.

We advise clients on an extensive array of claims, including health claims, weight loss claims, performance claims, warranties, “green” claims, textile, wool, and fur labeling requirements, pricing or sales claims, claims of US origin, and comparative claims. We have experience counseling clients regarding the myriad of differing state regulations governing promotions, such as sweepstakes and gift cards. We have advised consumer products and services clients from many different industries. In addition, our experience with privacy and data security issues includes matters arising out of the Health Insurance Portability and Accountability Act (HIPAA), the Children’s Online Privacy Protection Act (COPPA), and the European Union Directive on Data. The firm’s food and drug marketing experience includes FDA-related matters, food labeling, cosmetic claims, and pharmaceutical and dietary supplement labeling claims. We also help clients understand and comply with such challenging legislation as the Consumer Product Safety Improvement Act (CPSIA).

Our consumer protection and marketing experience extends internationally, and attorneys in our European practice advise on regulatory issues arising under EU law in relation to various industry sectors.
Investigations/Regulatory Oversight

Budget Rent A Car System: The firm represented Budget in connection with an FTC investigation, which was favorably settled, and represents the company in tag-along putative class actions related to fuel charges.

Clifton Telecard: Arnold & Porter represented Clifton Telecard in FTC and class action litigation related to prepaid calling cards, resulting in a favorable global settlement.

Dietary Products Manufacturer: We represented a dietary products manufacturer in FTC investigations related to weight loss claims and other health benefit claims. The cases were favorably settled.

Consumer Class Actions

Bluetooth: Arnold & Porter represented a major Bluetooth headset manufacturer in a series of class actions alleging failure to warn of risks of noise-induced hearing loss. Multiple cases were consolidated in a multidistrict litigation. A nationwide settlement resulted in a slightly revised manual warning and cy pres payments.

The Vitamin Shoppe: In a case that generated significant national publicity, the firm represented The Vitamin Shoppe in suits filed in multiple jurisdictions alleging excessive lead in a multivitamin as well as less calcium than indicated by the label. A state court settlement followed a multiparty mediation.

Progesterone Cream: In one of the first tests of restrictions on consumer litigation enacted by California voters in 2004, our attorneys represented 21 manufacturers of progesterone cream products against a private plaintiff who had purchased the products only to establish standing to sue. The case was dismissed, with the ruling upheld on appeal. *Buckland v. Threshold Enterprises, Ltd.*, 155 Cal. App. 4th 798 (2007).

Philip Morris USA: We have succeeded in opposing class certification and/or obtaining dismissal of claims brought by purchasers of light cigarettes seeking to recover billions of dollars in purported economic losses. We obtained a reversal of the certification of a nationwide Racketeer Influenced and Corrupt Organizations Act (RICO) class action in *McLaughlin v. American Tobacco Co.*, 822 F.3d 215 (2d Cir. 2008).

Investigations/Regulatory Oversight

Consumer complaints in response to your marketing or promotion initiative may trigger a letter or subpoena from a regulatory agency. Arnold & Porter has a depth of experience in handling FTC and state attorney general investigations of advertising claims, inquiries relating to consumer privacy, product safety recalls, investigations of telemarketing claims by the FCC, and investigations of food, cosmetic, and dietary supplement claims by the FDA. We handle the defense of such investigations aggressively and creatively, while still maintaining a professional and respectful relationship with the regulatory staff. Indeed, many of our lawyers are alumni of these agencies. Having the right regulatory team in place is even more important in today’s litigation environment because, increasingly, regulatory action leads to consumer and competitor litigation, and one problem becomes many.

Litigation

Litigation against consumer product and services companies can take a number of forms, including consumer class actions, Lanham Act cases, California Proposition 65 actions, and challenges by the National Advertising Division (NAD) of the Council of Better Business Bureaus. Often such cases arise out of, or lead into, federal or state regulatory scrutiny. Our attorneys work effectively across offices and time zones and have extensive experience with the full range of consumer-related litigation matters in courts across the United States.

Consumer Class Actions

Our attorneys regularly defend consumer product and services companies in class actions, often involving cases in multiple state and federal courts requiring efficient coordination and use of local counsel. We also have extensive experience in effectively coordinating regulatory investigations and consumer litigation to achieve optimal, cost-effective results.

We serve our clients by thoughtful analysis, creative strategy, and zealous advocacy, with the client’s business goals paramount. We also are used to working with public relations experts to minimize the impact of the litigation on the brand.
Competitor Challenges

We have extensive experience in making and defending against competitor challenges. Sometimes challenges are fought out in a self-regulatory forum such as that provided by the NAD. Our lawyers have appeared before the NAD and on NAD panels and have counseled clients on the pros and cons of NAD challenges versus litigation in court. We regularly work with the top consumer survey experts who are called upon to analyze and elaborate on consumer perceptions. In addition, we have extensive experience dealing with competitor false advertising challenges in federal court under the Lanham Act, as well as with matters that fall under the general purview of unfair or deceptive trade practices.

Consumer Product Safety

The firm has leading practices in matters before the CPSC and in matters arising under state consumer protection laws, such as California’s Proposition 65. We help companies avoid unnecessary recalls, assist in implementing voluntary recalls, and defend against claims in administrative and court proceedings. We also help companies adapt their operations to CPSC reform legislation.

Perdue Farms and Sanderson Farms:
Arnold & Porter represented Perdue Farms and Sanderson Farms in a Lanham Act case involving Tyson Foods. In a major victory for the firm, a Baltimore federal court issued an injunction against Tyson Foods, barring it from advertising its chicken as “raised without antibiotics.” Tyson was forced to suspend a multimillion dollar national advertising campaign.

Global Recalls: We regularly represent manufacturers and retailers in coordinating recalls both in the US and globally. The firm represented the manufacturer of an electronic product in notifying regulatory authorities and recalling the product in more than 20 countries, coordinating the recall so that it was announced at the same time around the world.

Avoiding Unnecessary Recalls: The firm represented a leading retailer in securing a decision from the CPSC that a product distributed by our client need not be recalled. We also successfully defended a related consumer class action involving the same product. By defeating the plaintiff’s class certification motion, we ended litigation through which plaintiffs sought to require our client to conduct a nationwide recall.

CPSIA Compliance: We are representing numerous manufacturers, distributors, and retailers of consumer products, drugs, and cosmetics in helping them to comply with groundbreaking reform legislation embodied in the 2008 Consumer Product Safety Improvement Act.
Our Comprehensive Consumer Protection Practice

**Consumer Protection Services**
- Lanham Act litigation
- Consumer class actions
- Claim substantiation counseling
- California Proposition 65
- Telemarketing, slamming, cramming, phishing, spamming, pretexting
- Marketing to children
- Consumer product safety
- Privacy and identity theft
- Commercial speech
- Sweepstakes and promotions
- Consumer credit and fair lending

**Industry Experience**
- Agriculture
- Apparel
- Appliances
- Brokerage services
- Building supplies
- Car rentals
- Computer equipment and batteries
- Consumer credit
- Cosmetics
- Dietary supplements
- Electronics
- Entertainment
- Food
- Hospitality
- Housewares
- Internet services
- Lighting fixtures
- Luxury brands
- Motor vehicle equipment
- Off-road vehicles
- Pharmaceuticals
- Sporting goods
- Telecommunications
- Tobacco
- Toys and children’s products

**Former Senior Government Officials**
- Chairman, FTC and Director, Bureau of Consumer Protection, FTC
- Director, Bureau of Competition, FTC
- Attorney Advisor to the Commissioner, FTC
- General Counsel, CPSC
- Chief, Common Carrier Division, FCC
- Associate Chief Counsel for Enforcement, FDA
- Associate Deputy Attorney General, Department of Justice
- General Counsel, National Security Agency
- Chief, Major Crimes and Computer Hacking/Intellectual Property Unit, US Attorney’s Office, Southern District of NY
About Arnold & Porter

At the intersection of business, law, and regulatory policy. With roots in the days of the New Deal and an outstanding record of commitment, excellence, and innovation, Arnold & Porter stands today as a preeminent international law firm. Arnold & Porter attorneys, practicing in more than 25 distinct areas of the law, conduct business on six continents. Our global reach, experience, and deep knowledge allow us to work across geographic, cultural, technological, and ideological borders, serving clients whose business needs require US, EU, or cross-border regulatory, litigation, and transactional services.

Commitment to our clients, community, and values. We provide the full breadth of legal resources to represent our clients’ interests. Through interdisciplinary collaboration and specialized experience in our clients’ industries, we are able to offer truly innovative and effective solutions that align with both clients’ short- and long-term business objectives. For those clients who cannot afford legal counsel, we maintain a broad and meaningful pro bono practice, ranking among The American Lawyer’s top five pro bono firms. In addition, Arnold & Porter is the only law firm in the country recognized by FORTUNE’s “100 Best Companies to Work For” list, Working Mother’s “100 Best Companies” list, and The American Lawyer’s “A-List” of the nation’s top 20 law firms.

Excellence in the practice of law. We set our standards high, expect the best from our attorneys, and return top-tier work on behalf of our clients. Our tradition of excellence is distinguished, and our attorneys are widely respected worldwide. Our attorneys are leaders in their fields, speak frequently throughout the world on the firm’s core practice areas, and are published widely in legal journals, industry, and mass media.

Innovation in our work and in the world. We continue to build a reputation for legal work that is not only effective, but often groundbreaking. Whether working on a precedent-setting case or structuring a transaction in a truly original way, we endeavor to be innovative in approach and transformational in impact. As our practice embraces the rapidly changing international landscape, our firm has become a powerful partner for global business. We serve sovereign governments, US and European businesses, multinational corporations, and international businesses.

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Tab 7: Consumer Advertising Law Blog
Arnold & Porter LLP produces the Consumer Advertising Law Blog, a multidisciplinary blog that provides commentary and news on developing legal issues in consumer marketing, advertising, and promotional activities, including Federal Trade Commission (FTC) and state attorney general developments, Lanham Act and consumer class-action litigation, consumer product safety matters, as well as regulatory developments for a wide array of products and claims.

To subscribe to the blog, go to Get Updates Via E-Mail header, and click on the Subscribe to Consumer Advertising Law Blog by E-Mail link. You will then be prompted to enter your email address. A confirmation e-mail message will be sent to that address.