

ASSOCIATION OF BUSINESS TRIAL LAWYERS

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REPORT

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10 WAYS TO IMPROVE YOUR NEXT DISPOSITIVE MOTION: WRITING TIPS FOR BUSY TRIAL ATTORNEYS

A poorly written motion for summary judgment or other dispositive motion can dramatically alter the course of the litigation. A dispositive motion that fails to communicate clearly the merit of the client's position can prolong the litigation or, worse, transform a case that should be won before trial into a case that may be lost after trial.



Mitchell C. Tilner

To increase the likelihood that the court will find your next dispositive motion persuasive, prepare the motion with the following tips in mind.

1. Craft an effective introduction after writing the legal argument.

An effective introduction is essential to any dispositive motion, but crafting an effective introduction can be a challenge.

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FOOD FIGHT: HOW PRODUCTS LIKE CRUNCH BERRIES AND ICE CREAM ARE SHAPING CALIFORNIA'S FALSE ADVERTISING LAW



Shannon S. Raj

At the forefront of developments in false advertising law are questions like the following: Is the label "Crunch Berries" misleading if the product contains no berries or other fruit? Does calling an ice cream cone "The Original" and "Classic" indicate that it is healthier than other ice cream cones?

These and other questions are addressed in recent disputes under California's False Advertising Law ("FAL"), which prohibits advertisements likely to deceive a reasonable consumer. A number of the cases have been dismissed on the pleadings. Taken together, this line of food cases suggests that, when evaluating complaints alleging that companies are misrepresenting their products to consumers, California courts recommend a serving of common sense.

The seminal food case—and one that survived past the pleadings—is *Williams v. Gerber Prods., Co.*, 552 F.3d 934 (9th Cir. 2008). There, plaintiffs filed FAL and other claims alleging that they purchased Gerber's Fruit Juice Snacks as a healthy snack for their children in reliance on packaging that included images of



J. Warren Rissier

oranges, peaches, strawberries and cherries and the words "fruit juice." However, none of the pictured fruits were contained in the product; instead, the most prominent ingredients were corn syrup and sugar. Although the district court found that the alleged misrepresentations on the packaging were "not likely to deceive a reasonable consumer" in light of the ingredients listed on the side of the package, the Ninth Circuit reversed, noting that "whether a business practice is deceptive will usually be a question of fact not appropriate for decision on demurrer." Since *Gerber*, plaintiffs filing FAL claims have routinely relied on the decision to support arguments that their claims should survive past the pleading stage.

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PRESIDENT'S MESSAGE



This year marks the 40th Anniversary of the ABTL. The founders of our organization believed there was a need for, and would be an avid interest in, a group that focused on the litigation and trial of business cases. With this vision, from the outset, the ABTL has provided novel, informative programming and opportunities to enhance the dialogue between the bench and business trial lawyers.

I am honored, in my ninth year on the Board of the ABTL, to serve as its President. We have an impressive Board, which includes members of all local trial

and appellate courts, state and federal, and attorneys from both sides of the business bar. We are committed to the founding principles of the ABTL, and this year expanded the Board, from 45 to 55 members, to increase its diversity and vitality.

The ABTL certainly has its challenges. As a volunteer organization, we necessarily give way to our "day jobs." Personal and professional priorities often come first, whether those priorities are our cases and clients, our colleagues and communities, or our family and friends. And with limited resources, including the pressures that budgets and staffing have put on our courts and our practices, our challenges are amplified. Yet in the face of these competing interests, we remain dedicated to what the ABTL does best: "programming, programming, programming." And we will continue to foster dialogue among us, building lasting relationships that enhance our practices and our lives.

This year, we are expanding a number of our approaches to the work of the ABTL. In addition to a larger Board, we are increasing participation opportunities, adding a technology committee, restructuring the leadership of our Young Lawyers Division (YLD) and adding a YLD advisory board. And we are expanding our influence, with plans to add a senior advisory group and exploring ways to use our website and social media tools to market and communicate better and increase our impact.

I encourage all business trial lawyers to embrace the ABTL. Not only is your membership critically important, you all know attorneys in Los Angeles who are not involved with the ABTL. Let them know about us and encourage them to join. Beyond membership, we welcome your participation in our public service activities. With a focus this year on Los Angeles-area schools, you and your colleagues can help us expand the ABTL's influence by inspiring students to first imagine, and then pursue, an education and career in the law.

Ultimately, our ability to reach the objectives and deliver the benefits of the ABTL require participation. Renew your membership now. Calendar our dinner and lunch programs. Join us in a classroom to talk about your experiences as a lawyer. And do not miss the 40th Annual Seminar, to be held at The Ritz Carlton, Laguna Niguel from October 3-6, 2013. It has been a great year thus far, and I look forward to the balance of this exciting journey with you and our great group of Los Angeles Chapter ABTL Board members. See you soon.

*Sincerely,
Philip Cook*

ASSOCIATION OF BUSINESS TRIAL LAWYERS

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To ease the task, write the introduction last, after you write the legal argument. Here is why.

During the writing process, the legal argument as originally conceived will likely change. Points may be added, deleted, or reorganized. Authorities may be included or omitted, emphasized or deemphasized. If you prepare a pre-written introduction, you will almost certainly need revise it later to account for the evolution in the argument. Drafting the introduction first, therefore, accomplishes little.

In fact, drafting the introduction first can be counterproductive. Once an idea is committed to writing, it acquires a life of its own. It becomes resistant to the author's efforts to change it. (This is why editors are important.) A pre-written introduction may influence the manner in which the author drafts the legal argument. That is, the attorney may be inclined to draft the argument so that it conforms to the pre-written introduction. But that approach is backwards. The legal argument should dictate the form and content of the introduction, not vice versa. Until the legal argument takes final shape, the attorney cannot know exactly which points to include in the introduction and which of those to emphasize.

The introduction should be comprehensive yet succinct. It should include all the details the court needs to fully understand the argument while omitting details that detract from that argument. The goal is to write the introduction in a way that compels the court to grant the motion, even if the court does not read beyond the introduction.

An effective introduction is a microcosm of the legal argument. There should be a one-to-one correspondence between the points included in the introduction and the major points advanced in the legal argument. If the introduction as finally drafted includes a point that does not also appear in the legal argument, either delete the point from the introduction or add it to the legal argument.

2. Present the facts chronologically.

Flashbacks are fine in books and films, but they spawn confusion in motions. The court is better able to process, understand, and correlate facts when they are presented in chronological order. Yet it is surprising how often attorneys neglect this fundamental principle.

No doubt there are exceptional cases in which a strictly chronological presentation may not be the most effective. Imagine, for example, a case in which two or more critical sets of facts developed separately along parallel tracks. In such a case, it might make sense for the motion to present each set of facts separately, though some doubling back may be required.

But in most cases, the attorney departs from a strictly chronological presentation at his or her peril.

3. Use informative and consistent headings to organize the argument.

When drafting argument headings and subheadings, bear in mind that in the end they will be reproduced in the motion's table of contents, where they will form a useful outline of the argument. Draft the headings so that, if the court reads nothing but the table of contents, it will gain an understandable overview of the argument.

Each heading should embrace a single point. Present different points in different headings or subheadings. A heading that addresses multiple points is a sign that further editing is needed.

Each heading should be broad enough to embrace the entire textual argument it introduces, but no broader. That is, the substance of the heading and the text should match. The court should understand from the heading alone the thrust of the argument that follows.

Keep headings as short as possible by omitting unnecessary words. The longer a heading, the more difficult it is to read and digest. One-sentence headings are ideal, but two crisp sentences can be more effective than one long, unwieldy sentence. Save the argument's subtleties and nuances for the text; do not try to cram them into the heading.

Headings and subheadings reinforce each other most effectively when they are grammatically consistent or symmetrical. For example, if the first argument heading reads "summary judgment should be granted because plaintiff cannot prove defendant's conduct caused any injury" and the second heading reads "defendant's conduct was absolutely privileged," then conform the two headings either by striking the words "summary judgment should be granted because" from the first heading or by adding those words to the second heading.

4. Cite cases with care.

Evaluate and select case authorities with California's rules of stare decisis in mind. California Supreme Court decisions bind all lower California courts. When briefing an issue of California law, a California Supreme Court decision on point is the holy grail.

Absent a Supreme Court decision on point, cite a California Court of Appeal decision on point. If the Court of Appeal decisions on point are in conflict, anticipate that the judge will follow the decision issued by the appellate district to which any appeal in the case will be taken. If that decision is favorable to the client's position, emphasize that it was issued by the governing Court of Appeal. Otherwise, be prepared to distinguish the decision.

When a California appellate decision is on point and not in

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conflict with any other decision, citing a non-California opinion is unnecessary and can actually weaken the motion by suggesting that the California opinion is not truly controlling. On the other hand, when the Court of Appeal decisions are in conflict and neither was issued by the appellate district in which the superior court sits, add citations to non-California decisions and/or secondary authorities to persuade the superior court that the trend in the law or the better reasoned view supports the client's position.

Take note of how the Court of Appeal disposed of the cited case. An attorney moving for summary judgment should think twice before citing a case in which the appellate court reversed a summary judgment, even though the opinion contains language favorable to the client's position.

Avoid the common mistake of thinking that more citations are necessarily better. Citations to unnecessary or tangential authorities can dilute the impact of stronger authorities and can afford the opponent an opportunity to distract the court from the stronger authorities.

Elaborate on the facts and the legal reasoning of only the strongest and most important authorities. Do not waste space explicating authorities that support legal propositions that are well settled or unlikely to be disputed. The court hardly needs a lengthy analysis demonstrating that irrelevant evidence is inadmissible. A less important authority may be cited with a parenthetical explanation of the proposition for which it is cited. Parenthetical explanations are handy for conveying the gist of an authority in few words and are particularly effective when used to supplement the discussion or summary of a leading authority.

Finally, quote only essential or uniquely expressive language. Omit long blocked quotations, which busy judges have been known to skip over.

5. Heed the rules of grammar and standard English usage.

Legal writing and other forms of writing differ principally in their respective purposes. Other forms of writing may be designed principally to entertain, to educate, or simply to communicate ideas. A dispositive motion, in contrast, is designed principally to persuade. But like all writing, legal writing is most comprehensible when it adheres to settled grammatical principles and conforms to standard English usage.

For example, a sentence will usually be easier to understand if the subject and the verb are close together. Consider: "The plaintiff, who had been employed by the company for ten years, who had never received a negative review, and who was by all indications an exemplary employee, was terminated without

warning." Because the subject ("the plaintiff") is far removed from the verb ("was terminated"), the reader must hold the subject in mind while trudging through the intervening text. The presentation suffers because the reader cannot fully focus on the intervening text the first time through; he or she may need to read the sentence twice to grasp all the information it contains. To improve the presentation, the author should reword the sentence, or break it up, to bring the subject and verb closer together: "The company employed the plaintiff for ten years. She never received a negative review and was, by all indications, an exemplary employee. Then, the company terminated her without warning."

Another example: given the way English works, readers expect to find the sentence's most important point at the end. Consider these two examples: (1) "Plaintiff filed his complaint on July 16, 2007." (2) "On July 16, 2007, plaintiff filed his complaint." Note the subtle difference in emphasis. In the first example, the writer is telling us when the plaintiff filed the complaint. In the second example, the writer is telling us what happened on July 16, 2007.

Another example: a sentence will usually be more direct and forceful if it speaks in the active voice, rather than the passive voice. A sentence speaks in the active voice when the subject is mentioned first, then the verb, and then any direct object: "The court overruled the defendant's objection." The sentence is clear and succinct. In the passive voice, the order is reversed and, as a result, the sentence is less forceful: "The defendant's objection was overruled by the court." Because readers generally expect sentences to be constructed in the active voice, they more easily assimilate information presented in that construction. Aside from being less forceful, the passive voice tends to obscure the subject; it can even omit the subject: "The defendant's objection was overruled." Of course, that may be a good thing—when you want to obscure the subject: "The filing deadline was missed."

A complete survey of English usage is obviously beyond the scope of this article. When in doubt, consult a reference work, or a colleague knowledgeable in the ways of English grammar.

6. Choose words carefully.

A painter's palette offers an array of shades of a single color. Powder blue, light blue, sky blue, navy blue; they are all blue, but they leave different impressions on the viewer. Part of the painter's art lies in choosing just the right shade to express his or her vision.

In the same way, part of the lawyer's art lies in choosing just the right word to express his or her idea. Event, accident,

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occurrence, mishap, collision, crash, calamity; all these words more or less evoke the same fact, but they have different shades of meaning and leave different impressions on the reader. Choose words carefully, so their shades reinforce, rather than undermine, the arguments advanced in the motion.

7. Do not attack the opponent or any court.

In the heat of litigation, attorneys may be tempted to attack the opposing attorney's or party's motives or integrity. Phrases such as "in a deliberate attempt to mislead the court" and "counsel knows that what he asserts is untrue" begin creeping into written arguments.

Launching a written attack on the opponent's motives or integrity is unwise for several reasons. First, it accomplishes nothing; it does not improve the chances of success. The court will evaluate the parties' respective arguments based on their merits and to rule accordingly, whether or not one of the parties is "attempting to mislead the court."

Second, judges at all levels almost universally confirm that attacking an opponent is counterproductive. It risks offending the judge and turning his or her sympathies toward the victim of the attack. Common sense dictates that a party pleading for relief from a judge should steer clear of tactics likely to offend the judge.

Third, it is simply presumptuous of one party to surmise another party's motives or intentions. Fortunately for us all, we cannot know what others are thinking (unless they tell us). The opponent's factual and legal assertions are fair game, as are the opponent's objectively verifiable deeds. They may and should be challenged as circumstances warrant. But the opponent's unstated motives or intentions in presenting an argument, like our own, should be off-limits.

A related point: never attack the integrity or competence of a court or judge. Nothing prompts judges to circle the wagons faster than an attack on any judge's integrity or competence. When confronted with an adverse authority, deal with it on the merits. Do not disparage the authority as the product of an "uninformed" or "result-oriented" court.

8. Keep the motion as brief as the argument will allow.

Brevity is not only the soul of wit, it is the heart of a persuasive motion. The Declaration of Independence, a legal argument of sorts, contained 1,328 words and, it should be noted, very few adverbs. Lincoln's Gettysburg Address contained about 270 words. Conveying powerful ideas in few words is an art. Page and word limits set by court rules are just that—limits, not targets. Many attorneys see no need to shorten a motion if it complies with the governing page or

word limits. But that view may be short-sighted. Judges rarely read motions to be entertained, so more is usually not better.

Strive to present your arguments in as few words as possible. Put simply, eliminate unnecessary words.

Start by deleting "filler" phrases or words, i.e., phrases or words that occupy space without adding to the sentence's meaning. Many attorneys are so accustomed to using filler words that they unconsciously include them. Can you spot the filler words in these examples?

"The question as to whether plaintiff signed the contract is a question of fact."

"Defendant was unable to transmit the proposal due to the fact that plaintiff had turned off his fax machine."

"Plaintiff suffered serious injury as a result of the fact that defendant breached the standard of care."

"It is defendants' position that summary judgment should be granted."

Each of the foregoing assertions can be stated more succinctly and forcefully by omitting the filler words:

"Whether plaintiff signed the contract is a question of fact."

"Defendant was unable to transmit the proposal because plaintiff had turned off his fax machine."

"Plaintiff suffered serious injury because defendant breached the standard of care" or "Defendant's breach of the standard of care caused plaintiff serious injury."

"Summary judgment should be granted."

Another sure way to eliminate unnecessary words and shorten the motion is to search for and delete repetition in the legal argument. When an attorney believes the motion hinges on a key point of fact or law, the attorney may be tempted to hammer the point repeatedly, fearful that otherwise the court may not appreciate its significance. Every key point, however, will be included in the introduction. When the court meets the point in the legal argument, the court should be reading it for the second time. It is usually sufficient, therefore, to make the point once in the legal argument. Repeating the point more than once in the legal argument rarely enhances persuasiveness but simply lengthens the motion.

Finally, omit diversions, asides, commentary, and other observations that, while interesting or marginally relevant, do not materially advance the argument. For example, unless the argument in support of summary judgment somehow turns on the fact that plaintiff's deposition had to be rescheduled four times, resist the urge to devote valuable space venting about this annoyance.

9. Be clear.

Every lawyer has had the experience of reading a court's opinion or order and struggling to understand what the court

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CALIFORNIA SUPREME COURT OVERRULES 78-YEAR-OLD PENDERGRASS DECISION AND REESTABLISHES ADMISSIBILITY OF ORAL MISREPRESENTATIONS TO VITIATE AN INTEGRATED WRITTEN AGREEMENT



Kim Posin

Although the parol evidence rule is intended to make the terms of an integrated written document the exclusive evidence of the parties' agreement, the fraud exception allows a party to introduce extrinsic evidence to support an allegation that the agreement was tainted by fraud. *See* Cal. Code Civ. P. § 1856; Cal. Civ. Code § 1625. However, in 1935, the California Supreme Court established a significant limitation on the fraud exception. In *Bank of America National Trust and Savings Assn. v. Pendergrass*, 4 Cal.2d 258 (1935), the Court held that evidence offered to prove fraud "must tend to establish some independent fact or representation, some fraud in the procurement of the instrument or some breach of confidence concerning its use, and not a promise directly at variance with the promise of the writing." *Id.* at 263. Although several California courts have criticized the holding in *Pendergrass*, it has remained good law for more than 75 years.

On January 14, 2013, however, the California Supreme Court overruled *Pendergrass* and its progeny. In *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Association*, 55 Cal. 4th 1169 (2013), the Court held that evidence of an alleged oral misrepresentation of the written terms of an agreement was admissible. The Supreme Court cited a number of "good reasons" for reconsidering *Pendergrass*, including: (1) the limitation is not supported by the statute codifying the parol evidence rule and the fraud exception; (2) the limitation is difficult to apply, depends on artificial distinctions and has led to unnecessary complexities; (3) the limitation conflicts with the Restatements, most treatises and the law of most other jurisdictions; (4) the limitation may actually provide a shield for fraudulent conduct; and (5) the *Pendergrass* ruling departed from established law at the time it was decided, without justification.

Mr. and Mrs. Workman, Riverisland Cold Storage, Inc. and the



Wayne Flick

Workman Family Living Trust ("Plaintiffs") were unable to make payments due on a loan given by defendant Fresno-Madera Production Credit Association ("Defendant"). In an agreement dated March 26, 2007, Plaintiffs restructured their debt and Defendant promised not to take any action to enforce its rights until July 1, 2007, if Plaintiffs made certain payments. Plaintiffs also pledged eight additional parcels of land to secure the debt. Plaintiffs failed to make the payments required by the restructuring agreement and, on March 21, 2008, Defendant issued a notice of default. Plaintiffs subsequently repaid the loan and sued Defendant, asserting fraud and negligent misrepresentation. They alleged that, prior to the parties' entry into the restructuring agreement, Defendant's vice president confirmed orally that the loan would be extended for two years (instead of three months, as provided in the written agreement) in exchange for adding only two additional parcels as collateral. Defendant moved for summary judgment, contending that Plaintiffs could not prove their claims because the parol evidence rule barred the inclusion of any evidence that would directly contradict the terms of the written agreement. Relying on *Pendergrass*, the trial court granted summary judgment. The Court of Appeal reversed the trial court, holding that *Pendergrass* is limited to cases involving promissory fraud.

The parol evidence rule both serves an evidentiary purpose and determines the enforceable terms of an integrated written agreement. *See Riverisland*, 55 Cal. 4th at 1174. Code of Civil Procedure section 1856(f) establishes an exception to the parol evidence rule permitting the admission of evidence offered not to alter the terms of the agreement, but to challenge the validity of the agreement itself. *See* Cal. Code Civ. P. § 1856(f); *Riverisland*, 55 Cal. 4th at 1174-75 ("Evidence to prove that the instrument is void or voidable for mistake, fraud, duress, undue influence, illegality, alteration, lack of consideration, or another invalidating cause is admissible. This evidence does not contradict the terms of an effective integration, because it shows that the purported instrument has no legal effect.") (citing 2 Witkin, Cal. Evidence (5th ed. 2012) Documentary Evidence, § 97, p.242). In addition, Section 1856(g) is explicit that "[t]his section does not exclude other evidence . . . to establish . . . fraud." Cal. Code Civ. P. § 1856(g). The *Pendergrass* court had nonetheless imposed a limitation on the fraud exception. Yet, in 1977, the California Law Revision Commission proposed modifications to the statutory formulation of the parol evidence rule making no mention of *Pendergrass* and its limitations on the fraud exception. *See Riverisland*, 55 Cal. 4th at 1178-79. The Legislature later

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adopted the Commission's proposed revisions without substantive change to provisions permitting evidence relevant to the validity of an agreement and evidence of fraud. *See* Recommendation Relating to Parol Evidence Rule (Nov. 1977) 14 Cal. Law Revision Com. Rep. (1978) p. 152; Stats. 1978, ch. 150, § 1, pp. 374-75.

Considering the state of the parol evidence rule at the time *Pendergrass* was decided, the Supreme Court found that earlier cases routinely permitted parol evidence to prove allegations of fraud, including promissory fraud. *See, e.g. Ferguson v. Koch*, 204 Cal. 342, 347 (1928) ("Parol evidence is always admissible to prove fraud, and it was never intended that the parol evidence rule should be used as a shield to prevent the proof of fraud."); *Langley v. Rodriguez*, 122 Cal. 580, 581-82 (1898) ("[C]ases are not infrequent where relief against a contract reduced to writing has been granted on that ground that its execution was procured by means of oral promises fraudulent in the particular mentioned, however variant from the terms of the written engagement into which they were the means of inveigling the party."). The Supreme Court also found the cases on which the *Pendergrass* decision was based to be inapposite. These conclusions led the Court to determine that *Pendergrass* "was an aberration" as its holding "failed to account for the fundamental principle that fraud undermines the essential validity of the parties' agreements." *Riverisland*, 55 Cal. 4th at 1182. The Court did caution, however, that the intent element of promissory fraud requires more than proof of an unkept promise or mere failure to perform. And it left for another day the question whether a party who does not read a written agreement before its execution can be found reasonably to have relied on contradictory oral statements made before entering into the agreement, as all allegations of fraud require a showing of justifiable reliance. *See id.* at 1183.

Kim Posin is a partner in the Los Angeles office of Latham & Watkins and is a member of the Finance Department and the Restructuring, Insolvency & Workouts Practice. Ms. Posin specializes in representing corporate debtors and secured lenders in all aspects of bankruptcy proceedings, but she has also represented unsecured creditors' committees and equity holders.

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**ABTL – LOS ANGELES MEMBERS
SUPPORT STUDENTS WHO DREAM
OF A BETTER FUTURE**

Three groups of ABTL Lawyers and judges from across Los Angeles explained the law to – and created a few legal dreams for – three different groups of young students, "Dreamers," with the "I Have a Dream" Foundation – Los Angeles (IHADLA).

On October 4, 2012, attorneys Robert Broadbelt (who was recently appointed to the Los Angeles Superior Court), Esteban Rodriguez and IHADLA Board member Sabrina Strong spoke to the seventh grade Dreamers at Century Community Charter School in Inglewood. On October 29, 2012, Judge John Segal, and attorneys Robyn Crowther and Jason Wright spoke to the sixth graders at Daniel Freeman Elementary School, also in Inglewood. Finally, on November 14, 2012, Judge Stephen Hillman, along with attorneys Dan Alberstone and Jim Burgess, spoke to high school seniors in Boyle Heights.

All three of the sessions were organized by Ms. Strong – Chair of the Public Service Committee for the Los Angeles Chapter of the Association of Business Trial Lawyers – and were part of IHADLA's new Dream Speaker Series, where professionals from a variety of fields visit with the Foundation's students to discuss what they do, speak to the value of their education, and offer life lessons and guidance.

"All three groups of lawyers and judges were so terrific," reported IHADLA Executive Director Katy Garretson. "A couple of weeks after the legal team made their case, I brought another Dream Speaker to visit with the sixth grade Dreamers in Inglewood, and when the speaker asked the group what they wanted to be when they grew up, FIVE said 'family lawyer!' Love that."

The "I Have a Dream" Foundation – Los Angeles helps kids in need access better life opportunities and get a good education. The Foundation adopts an entire third grade at an inner-city, Title 1 school, regardless of the children's abilities or disabilities, and monitors the progress of those kids for over ten years, giving them after-school and summer programs, academic and cultural enrichment, counseling services, arts instruction, etc., and then tops it all off with a scholarship for college or career training when they graduate from high school. The most recent graduating class of Dreamers, in 2010, had a 94% high school graduation rate, and 96% of those are now in college or vocational school.

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This year, IHADLA is celebrating its 25th Anniversary, and is proud to have seen over 1,000 Dreamers complete its programming. There are currently four active dreamer classes: high school seniors in East Los Angeles, sixth and seventh grade Dreamers in Inglewood, and 70 new third grade Dreamers in Watts.

IHADLA exists solely out of the generosity of private donors. It is a 501(c)3 organization. The best way to learn more about the "I Have a Dream" Foundation – Los Angeles, and how to volunteer, be a mentor or become a sponsor, is to visit the website, at www.ihadla.org. On the IHADLA blog page, there is a post and a photo under "What It Takes To Be A Lawyer," that features the afternoon with the seventh grade Dreamers in Inglewood.

For more information on IHADLA, please contact Executive Director Katy Garretson at (213) 572-0175. For more information on how to volunteer your time with the ABTL's Public Service Committee, please contact Sabrina Strong at sstrong@omm.com

UNDERSTANDING THE INTERPLAY BETWEEN WORKER'S COMPENSATION AND DISABILITY DISCRIMINATION



Nikki Tolt

You are a prudent, responsible employer appropriately covered for any potential injuries your employees may incur by having Worker's Compensation insurance. You either administer any Worker's Compensation claims in house, or you have a third party administrator ("TPA") handling the claims for you.

When you have an injured employee, you comply with the law, report the claim to the insurance carrier, give the employee the appropriate forms, make sure the employee gets the appropriate medical care and ensure that the employee gets all the benefits he or she is entitled to. So how is it that you have run afoul of California's disability laws under the Fair Employment and Housing Act ("FEHA")? Understanding the interaction between the two statutory schemes, Worker's Compensation and the FEHA, and their respective mandatory duties, (sometimes referred to in Human Resources literature as the "Bermuda Triangle" and for good reason), is key to avoiding being blindsided by costly litigation

continued next column...

and exposure to potentially huge liability, for which you may not have any insurance coverage (as a general rule, employment related claims are not covered by General Liability Insurance Policies and many employers do not carry Employment Practices Liability Insurance, thus leaving them exposed to the triple costs of defense, liability and the employee's attorney fees under the FEHA fee shifting provisions). The important thing to remember in these cases is that each separate legal issue imposes separate and distinct duties and obligations on the employer and employee. Satisfying what is required of one does not mean that you have satisfied the other.

There are two very common misconceptions about disability discrimination claims. First, unlike some forms of discrimination, where disability discrimination is claimed, there is no need for a showing of personal animus - that is not an element of the claim. *Humphrey v. Memorial Hospitals Assn.*, 239 F.3d 1128, 1139-40 (9th Cir. 2001). Thus, technical violations lead to liability as surely as deliberate discrimination. In the context of disability laws and their practical application to the workplace, there are a number of technicalities which can entrap a complacent employer who is not knowledgeable and/or vigilant about its FEHA obligations.

Second, employers often think that, once an employee has made a Worker's Compensation claim, they are insulated from claims of discrimination as long as they are compliant with the Worker's Compensation laws. But, it is well established that accepting Worker's Compensation benefits does not preclude an employee from bringing a concurrent civil action against the employer. *See Fretland v. County of Humboldt*, 69 Cal. App. 4th 1478 (1999); *Bagatti v. Dep't of Rehabilitation*, 97 Cal. App. 4th 344 (2002).

A. FEHA's Duties or Prohibitions Relating to Employees with Disabilities.

The FEHA has a complex set of rules that relate to disabled employees, but for purposes of the interaction with Worker's Compensation claims, there are three separate subsets of disability duties found in the FEHA that are the key to understanding the employer's obligations to its disabled employees. Each of these three separate duties under the FEHA can form the bases for a disability related claim, thus each must be analyzed separately.

1. FEHA Prohibits "Discrimination" Based on Actual or Perceived Medical Condition, Physical Disability or Mental Disability.

Under the FEHA, it is an "unlawful employment practice"

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to discriminate against any person because of “physical disability, mental disability, [or] medical condition.” Cal. Gov. Code § 12940(a). This discrimination ban applies not only to those persons who actually have a qualifying disability, but also to those who are “regarded as” disabled by their employer. Cal. Gov. Code § 12926.1(d) (“[T]he Legislature intends ... to provide protection when an individual is erroneously or mistakenly believed to have any physical or mental condition that limits a major life activity.”); *see also* Cal. Gov. Code § 12926(i)(4) and (k)(4). It may seem obvious that an employee is disabled while they are out on Worker’s Compensation leave, the issue often gets muddled when the employee is released to return to work, with or without restrictions as discussed below.

2. FEHA Imposes a Duty to Provide Reasonable Accommodations.

In addition to the ban on “discrimination” against an individual with a disability, the FEHA requires that the employer provide reasonable accommodations that will allow the employee to perform the essential functions of the job. This duty is found in Government Code section 12940(m), which makes it an unlawful employment practice “[f]or an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee.” The duty to provide a reasonable accommodation applies not only to employees with actual disabilities, but also to those who are mistakenly regarded or perceived to be disabled. *Gelfo v. Lockheed Martin Corp.*, 140 Cal. App.4th 34, 54-56 (2006). This subdivision also gives the employer an affirmative defense to an accommodation claim by proving that the proposed accommodation would “produce undue hardship to its operation.” Cal. Gov. Code § 12940(m).

The phrases reasonable accommodations, essential functions and undue hardship are terms of art with very complex meanings and sets of rules attendant to each, which cannot be explored in this article. It is very important to gain an understanding of each of these phrases because failure to understand them and how they are to be applied can lead to liability. In addition, whether the employer “knows” of the physical or mental disability such that the duty to accommodate is trigger can be a tricky issue in the context of a Worker’s Compensation claim because the specifics of the employees condition are often only known to the Worker’s Compensation insurer or the TPA. Nevertheless, based on agency principles, some cases impute knowledge or notice to the insurer or TPA directly to the employer for purposes of triggering the duty to accommodate. *See, e.g., Diaz v. Fed.*

Express Corp., 373 F. Supp. 2d 1034, 1056-1059 (C.D. Cal. 2005); *see also Rowe v. City & Co. of San Francisco*, 186 F. Supp. 2d 1047, 1054 fn.8 (N.D. Cal. 2002) (employer “surely has the ability to review an employee’s record for more information concerning the employee’s medical condition in determining whether she possesses a disability and requires an accommodation”).

3. FEHA Imposes on the Employer a Duty to Engage in the Interactive Process.

The duty to engage in the interactive process is found in California Government Code section 12940(n), which makes it an unlawful employment practice “[f]or an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.” The duty to engage in the interactive process applies not only to employees with actual disabilities, but also to those who are mistakenly regarded or perceived as disabled. *Gelfo*, 140 Cal. App. 4th at 54-56.

Generally, the interactive process takes place before an accommodation is either put into place or it is determined that no accommodation can be offered. This duty is not static, thus, as the employee’s medical condition evolves, the duty to engage in the interactive process is ongoing and different accommodations may be required or considered at different times. *Nadef-Rahov v. Neiman Marcus*, 166 Cal. App. 4th 952 (2008).

The interactive process is a fluid and ongoing one that requires that the employee and employer discuss relevant medical restrictions, the essential functions of the employee’s job, other open positions if the employee can no longer perform her former job and what physical, or other, accommodations would assist the employee to get back to work. *See Humphrey v. Memorial Hospitals Ass’n*, 239 F.3d 1128, 1138 (9th Cir. 2001).

The efficacy of the interactive process is heavily litigated. Often the employer is accused of only making cursory or superficial efforts at finding an accommodation through the interactive process. Employers often come to the discussion with preconceived notions about what can be done to get the employee back to work at their existing job or an alternate job in an open, vacant position. The interactive process is a delicate balance between (a) listening to the needs and desires of the employee and (b) proactive research such that effective solutions may be suggested by the employer. The larger the

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employer, the more effort is expected of it when it comes to seeking out and finding reasonable accommodations for the employee.

B. The FEHA v. Worker's Compensation

Two very common scenarios that invite a disability discrimination lawsuit occur when employers technically comply with Worker's Compensation laws.

Scenario one involves an employee who has been injured on the job, has sought medical treatment through a doctor of their choice and has filed a Worker's Compensation claim. Typically, the employee is off work on temporary disability, often for an extended period of time. As part of resolving their claim through the Worker's Compensation system, the employee submits to either an Agreed Medical Examination ("AME") or a Qualified Medical Examination ("QME"). While the AME or QME report is pending, which frequently takes months after the medical evaluation, the employee's doctor releases the employee back to work without any restrictions. The employee submits a doctor's note to the employer and the employer either (a) puts the employee back to work or (b) sends the employee to a "company" doctor to get confirmation of the return to work release. If a company doctor examines the employee, the examination is usually cursory and the resulting recommendation rarely conflicts with the employee's treating physician. The employee comes back to work and carries out the essential functions of the job without incident for months.

When the QME or AME report is finally ready, the Worker's Compensation claims adjuster forwards the "conclusions" either directly to the employer's Human Resources department or to the TPA. Because of HIPAA confidentiality issues, only the doctor's conclusions are conveyed. If the AME/QME doctor concluded that the employee either should not be released to work, or that he or she may return to work with restrictions, that is typically where the liability issues arise. This is particularly true where the AME/QME doctor concludes that the employee cannot engage in the essential functions of their current job and recommends vocational rehabilitation for the employee. Employers often mistake these recommendations as a mandate to take the employee off the job and either allow the employee to languish on extended unpaid leave, or terminate their employment. These actions run afoul of the FEHA.

Whether the AME/QME doctor concludes that the employee cannot return to work, or that he/she can only do so with restrictions, the conclusion collides with the reality that

the employee is back at work doing the job without accommodation. Clearly, the employer is faced with conflicting information. It is risky for the employer to rely solely on the AME/QME doctor's evaluation as a number of courts have determined that such reliance is not a complete defense. Rather, the reasonableness of such reliance is a question of fact for a jury to decide. *See Echazabal v. Chevron USA, Inc.*, 336 F.3d 1023, 1028 (9th Cir. 2003); *Deppe v. United Airlines*, 217 F.3d 1262 (9th Cir. 2000) (factual issue raised because employer's doctor stated that the plaintiff was unable to return to work, but plaintiff's own physician felt otherwise.)

Rarely are AME/QME doctors provided with essential information to evaluate whether or not the employee can return to work with or without accommodation for the simple reason that in the Worker's Compensation system, the evaluation that is being sought from the doctor is different than an evaluation under the FEHA. For instance, "the workers' compensation definitions of 'disability' do not distinguish between marginal and essential job function and do not consider whether an individual can work with reasonable accommodation." *Jackson v. County of Los Angeles*, 60 Cal. App. 4th 171, 188 (1997).

As a practical matter, the AME/QME doctor is rarely given a job description, let alone an analysis of what functions of the job are truly essential such that any restrictions can be evaluated in light of the realities of the job. Even if the employee cannot return to her former position, the company has a duty to see if it has any open, available positions for which the employee is qualified. Those potential jobs are almost never presented to the AME/QME doctor for evaluation. In litigation, these doctors almost always concede that if they had known that the employee was back at work doing the job without accommodation, their opinions would change, thus leaving the employer on the hook for relying on their original opinions.

The appropriate response to the conflicting medical opinions is to call the employee in and engage in the interactive process. If there is a serious concern for the employee's safety, it may be reasonable to place the employee on a temporary leave while the conflicting opinions are resolved. However, the employer cannot ignore the employee's input, especially if he or she has been doing the job without accommodation. Sometimes employers later argue in litigation that the employee was not disabled, therefore the employer owed them no duty; but liability cannot be escaped as the employee is obviously perceived to be disabled, mistakenly or not, which holds the employer to the same standards as if they actually were disabled. It is also dangerous to simply throw the

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employee back into the Worker's Compensation system because it often takes many months and occasionally years to wend through the procedural labyrinth of that system without any protection from liability under the FEHA.

As a general rule, employers should document all communications and all steps taken in the interactive process in the event the validity of the process is challenged. It is particularly important for the employer to document all of the communications with the employee once the employer is aware that conflicting medical opinions exist. It is reasonable to require the employee to return to their own doctor to receive clarification as to any restrictions in light of the AME/QME report. It is also reasonable to ask the employee for permission to communicate directly with his or her treating physician to seek clarification. If satisfactory information is not provided through these avenues, it is also reasonable for the employer to send the employee to a doctor of the employer's choice for a fitness for duty examination which will presumably be more thorough. Generally, an employer may conduct a fitness-for-duty examination of an employee if it is job-related and consistent with business necessity. See Cal. Gov. Code § 12940(f)(2). However, such an examination must be related to a legitimate business reason and cannot be just a fishing expedition which then implicates the Constitutional right to privacy. For instance, testing a truck driver for drugs after an accident is legitimate, but randomly testing clerical workers for drugs would rarely pass muster. In the context of a disabled employee, where there is a legitimate conflict in the information available to the employer which is not clarified promptly by the employee, such an examination would be appropriate before any the employer can evaluate whether the employee has a disability that must be accommodated.

Another landmine for the employer in this scenario exists when the AME/QME doctor sets out either ambiguous restrictions or restrictions that do not relate to an essential function of the job. For example, a restriction of "no heavy lifting" will likely mean something different for the construction worker than it does for the clerical worker. Thus it is dangerous to affect the employees status without getting clarification about the exact weight limitation. Second, the employer must determine whether the weight restriction affects an essential function of the job. If the doctor clarifies that "no heavy lifting" means no lifting over 50 pounds, the construction worker may have to lift items weighing 50 lbs or more, while the clerk is highly unlikely to do so, which means it would not affect essential job functions. But even if lifting items 50 pounds or more is an essential job function, the employer has a duty to determine whether some

accommodation is available to allow the employer to carry out this essential function so that he or she can continue working. For example, it would not be reasonable to require an employer to provide the employee with an assistant to do all the heavy lifting, on the other hand, providing the employee with a lifting mechanism like a dolly or forklift may be the solution, depending on the circumstances. Indeed, through the interactive process, the employer may learn that the employee has already implemented an accommodation on their own.

The second scenario that frequently causes employers to run afoul of the FEHA is the situation where the employee files a Worker's Compensation case and in that system, the employee is deemed "permanent and stationary" and unable to resume the essential job functions and is thus eligible for vocational rehabilitation. Even when the employee is deemed 100% disabled in the context of Worker's Compensation, that does not mean the employer can avoid seeing if an accommodation would allow the employee to perform the essential functions, or if it can reassign the employee to a vacant position. See, e.g., *Gelfo v. Lockheed Martin Corp.*, 140 Cal. App. 4th 34 (2006); *Diaz v. Fed. Express Corp.*, 373 F. Supp. 2d 1034 (C.D. Cal. 2005). It is not uncommon in Worker's Compensation claims that the employee's "on paper" medical restrictions seem to disqualify the employee from performing the essential functions. It is important to look beyond the "on paper" restrictions to determine whether the employee is actually able to perform the essential functions with or without accommodations. If an employer blindly relies on these "on paper" restrictions without a meaningful assessment of how they impact the employee's ability to perform essential job functions, the employer may open itself up to liability. *Gelfo*, 140 Cal. App. 4th at 46 n.11 ("Also under FEHA, as under the ADA, 'an employer cannot slavishly defer to a physician's opinion without first pausing to assess the objective reasonable-ness of the physician's conclusions.'").

Further, offering an injured employee vocational rehabilitation in the Worker's Compensation system is not considered a reasonable accommodation under the FEHA and does not satisfy the duty to accommodate. The Equal Employment Opportunity Commission's Enforcement Guidance (www.eeoc.gov/policy/docs/workcomp.html) makes this point clearly, noting that the law requires employers to accommodate an employee in his/her current position through job restructuring or some other modification, absent undue hardship. If it would impose an undue hardship to accommodate an employee in his/her current position, then the employer is required to reassign the employee to a vacant

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position s/he can perform, absent undue hardship. Further, as a general rule, the disabled employee is entitled to preference over a non-disabled employee when reassignment of an existing employee is in issue. *Jensen v. Wells Fargo Bank*, 85 Cal. App. 4th 245, 265 (2000). However, if the vacant position is a promotion, or would violate a bona fide seniority system under a collective bargaining agreement, the employer has no duty to promote the disabled employee or violate the collective bargaining agreement.

Even when the Employer understands that it must make efforts to determine whether it can accommodate the employee, another mistake that is commonly made is the failure to truly interact with the employee. Often, Human Resources personnel look at job descriptions and the restrictions identified by the employee's doctor and they unilaterally determine that no accommodation can be made, or that the employee cannot be placed in another job. For example, in *Nadef-Rahov, supra*, the plaintiff's doctor stated that she was unable to do work of "any kind" and the plaintiff herself indicated severe physical restrictions. Nevertheless, she sought to return to work, but was denied the opportunity because the Human Resources employee unilaterally determined that the plaintiff could not do the work required for any of the open positions, with or without accommodation.

The Court held that "[a] jury could also find it was unreasonable for Neiman Marcus to determine unilaterally that Nadef-Rahov was unable to perform any available vacant position in the company with or without accommodation and that her condition was not going to improve in the near future." *Nadef-Rahov*, 166 Cal. App. 4th at 989.

In *Prilliman v. United Airlines*, 53 Cal. App.4th 935 (1997), the court held that when an employer learns of an employee's disability, it is required to offer a reasonable accommodation, unless it can demonstrate that doing so would impose an "undue hardship." *Id.* at 947. It then cited with approval – and adopted – the following language from a case construing an analogous statute:

[An employer] may not merely speculate that a suggested accommodation is *not feasible*. When accommodation is required to enable the employee to perform the essential functions of the job, the employer has a duty to "gather sufficient information from the applicant and qualified experts as needed to determine what accommodations are necessary to enable the applicant to perform the job. . . ."

Id. at 948-949 (emphasis added, citation omitted).

Alternatively, employers in this situation often make the mistake of requiring the employee to be 100% healed before they are allowed to return to work. However, a "100% healed" or "fully healed" policy discriminates against qualified individuals with disabilities because it permits the employer to substitute the "100% healed" determination for the required individual assessment of whether the individual is able to perform essential job functions with or without an accommodation. See *McGregor v. Nat'l R.R. Passenger Corp.*, 187 F.3d 1113, 1116 (9th Cir. 1999) (discussing the analogous ADA). In fact, it is illegal to have a 100% healed policy because the required interactive process is fluid and ongoing, and may require continual reassessment. See *Humphrey*, 239 F.3d. at 1138.

Further, any policy of not making any permanent job accommodations is a per se violation of the FEHA, specifically California Government Code sections 12940(m) and 12940(n). "The law and the regulations clearly contemplate not only that employers remove obstacles that are in the way of the progress of the disabled, but that they actively re-structure their way of doing business in order to accommodate the needs of their disabled employees." *Sargent v. Litton Systems Inc.*, 841 F. Supp. 956, 961 (N.D. Cal. 1994) (applying California law).

C. Conclusion

Just being aware of the fact that the two statutory schemes impose different obligations on the employer at different times and based on different standards gives the smart employer the edge in looking out for ways to avoid liability while at the same time complying with the law. This should result in lessened exposure to a disability discrimination claim, while at the same time benefitting the both the employer and employee by salvaging the working relationship in a way that is constructive and advantageous to both parties.

Nikki Tolt has been a trial lawyer since 1983 when she graduated from Loyola Law School She founded ACT Mediation in 1996. She has mediated thousands of cases in a wide variety of areas including personal injury, employment (including wage and hour), various forms of professional malpractice, contract disputes, real estate and insurance matters. Ms. Tolt was named one of the top mediators in California in 2008 and 2012. Her office is in Beverly Hills where she maintains comfortable facilities for mediation.

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was trying to say. Sadly, not all opinions and orders are paragons of clarity. But your motion should be.

Stick with language as simple and clear as the case will allow. Do not “write like a lawyer.” Eschew terms such as “eschew,” when a commonly used alternative works equally well. Clear your writing of antiquated legalisms, such as “aforementioned,” “heretofore,” “herein,” and “said” (as in, “said premises”). Dispense with flowery, obfuscatory, opaque, hackneyed, or just plain dense language.

This is not to suggest that the motion should be “dumbed down” to a point where it patronizes the court. Make it simple (unpretentious, not complex, easy to understand), not simplistic (foolish, inattentive to nuance).

Avoid acronyms. They are rarely necessary and can impede comprehension. Learn from the experience of the lawyer whose fondness for acronyms drew this reaction from Judge Kozinski: “In a recent brief I ran across this little gem: ‘LBE’s complaint more specifically alleges that NRB failed to make an appropriate determination of RTP and TIP conformity to SIP.’ Even if there was a winning argument buried in the midst of that gobbledygoop, it was DOA.” (Kozinski, *The Wrong Stuff* (1992) 1992 Brigham Young U. L.Rev. 325, 328.) To forestall a similar judicial reaction to your own work, refer to the parties by name or shortened name, description (e.g., hospital, company), or role (plaintiff or defendant).

10. Lawyer, edit thyself.

Rare is the lawyer who can produce a file-ready first draft. First drafts, by their nature, tend to be wordy, repetitive, not well organized, unclear, or worse. After the motion has been fully drafted, set it aside for a few days (time permitting). Then, reread it, front to back, with a fresher eye and with all the principles discussed above in mind. Strike that superfluous sentence; strengthen the logic and flow of that argument by reversing the order of two points; distill that page-long case description into an informative parenthetical. Then, enjoy the satisfaction of knowing that, regardless how the court rules, the motion was the best it could be.

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However, in *Sugawara v. PepsiCo, Inc.*, No. 2:08-cv-01335-MCE-JFM, 2009 WL 1439115 (E.D. Cal. May 21, 2009) plaintiffs’ FAL claim was dismissed on the pleadings. Plaintiffs complained that the advertisement of “Crunch Berries” in Cap’n Crunch with Crunch Berries cereal was misleading because the cereal did not actually contain berries or other fruit. However, the United States District Court for the Eastern District of California, when dismissing the FAL claim on the pleadings, noted among other things that a reasonable consumer was not likely to be deceived because the packaging clearly stated below that the product was “sweetened corn & oat cereal.” The district court also distinguished *Gerber* on the grounds that, unlike *Gerber*, the cereal’s packaging made no claim to be particularly nutritious or designed to meet the nutritional needs of children.

On the same day it decided *Sugawara*, the same Court dismissed a second FAL claim at the pleading stage, this time on the grounds that consumers are not likely to be deceived into believing that “Froot Loops” cereal was made from real fruit. In *Videtto v. Kellogg USA*, No. 2:08-cv-01324-MCE-DAD, 2009 WL 1439086 (E.D. Cal. May 21, 2009), the Court dismissed plaintiff’s allegations that the use of the word “froot” in the name of the product “Froot Loops,” as well as the pictures of brightly colored cereal made to resemble fruit, led him to believe the cereal contained real fruit (Froot Loops’ only fruit content is a “small amount of ‘natural orange, lemon, cherry, raspberry, blueberry, lime, and other natural flavors,’ that appear tenth in order on the ingredient list... just before ‘red #40’”). The Court, unlike the plaintiff, was not surprised at the lack of fruit content in Froot Loops, pointing out that “the fanciful use of a nonsensical word cannot reasonably be interpreted to imply that the Product contains or is made from actual fruit.” As in *Sugawara*, the Court distinguished *Gerber* by noting that Froot Loops’ packaging did not assert that it was particularly nutritious or designed to meet children’s nutritional needs. Observing that the challenged packaging “contains the name ‘Froot Loops,’ . . . a picture of a bowl of multi-colored ring-shaped cereal . . . and the phrase ‘sweetened multi-grain cereal,’” the Court concluded that plaintiffs “received exactly what was described on the box.”

The Northern District of California continued the trend by granting a motion to dismiss in *Carrea v. Dreyer’s Grand Ice Cream, Inc.*, No. C 10-01044 JSW, 2011 WL 159380 (N.D. Cal. Jan. 10, 2011). In *Carrea*, plaintiffs claimed that Dreyer’s misrepresented its Drumstick ice cream products with terms on its packaging such as “The Original” and “Classic,” leading consumers to believe the ice cream products were wholesome and healthy, when they are not. The Court noted that “the primary evidence in a false advertising case is the advertising itself,” and that the Dreyer’s packaging specifically stated “Artificially flavored” next to the word “Vanilla” and under the allegedly misleading statement, “The Original.” Ruling that no reasonable consumer would likely be deceived into believing the ice cream was more healthful than similar products, the Court dismissed, on the pleadings, plaintiffs’ FAL and other claims. The Ninth

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Circuit affirmed the district court's ruling, holding that it "strains credulity" to claim a consumer would be misled into believing the ice cream product was healthier than its competitors by virtue of its "Original" and "Classic" descriptors. *Carrea v. Dreyer's Grand Ice Cream, Inc.*, 475 Fed. Appx. 113 (9th Cir. 2012).

Similarly, the Central District of California recently heard *Charles Hairston v. South Beach Beverage Co., Inc.*, No. CV 12-1429-JFW (DTBx), 2012 WL 1893818 (C.D. Cal. May 18, 2012), in which consumers of Sobe 0 Calorie Lifewater beverages challenged Sobe's "all natural" label as deceptive under the FAL and other statutes when Lifewater in fact contains vitamins that are synthetic or created via chemical processing. Plaintiffs additionally challenged Sobe's use of fruit names to describe the various Lifewater flavors when Lifewater contains no real fruit or fruit juice. The Court acknowledged *Gerber's* holding that "[t]he question of whether a business practice is deceptive in most cases presents a question of fact not amenable to resolution on a motion to dismiss," but said that Sobe's "all natural" language is not to be read "in a vacuum" and must be examined in the context of its additional statement "with vitamins." Given the clarity of the ingredient list and this modified statement, the Court dismissed plaintiffs' claims without leave to amend. The Court also found some of plaintiffs' claims were preempted by federal labeling regulations.

On the other side of the food fight, a handful of false advertising claims against food and beverage companies have survived past the pleading stage. For example, the Northern District Court of California recently denied a motion to dismiss in *Lam v. General Mills*, Case No. 11-5056-SC, 859 F. Supp. 2d 1097 (N.D. Cal. May 10, 2012), a putative class action in which plaintiffs claimed that General Mills misled consumers about the nutritional qualities of Fruit Roll-Ups and Fruit by the Foot. Plaintiffs alleged that the phrase "made with real fruit" incorrectly described the ingredients, which included partially hydrogenated oil and "sugars in quantities amounting to approximately half of each serving." Also, like in *Gerber*, plaintiffs alleged that the packaging included names and pictures of fruit not included in the product, which instead only contained some amount of pears from concentrate.

The Northern District of California also denied a motion to dismiss in *Astiana v. Ben & Jerry's Homemade*, Nos. C 10-4387 PJH, C 10-4937 PJH, 2011 WL 2111796 (N.D. Cal. May 26, 2011). There, plaintiffs alleged that Ben & Jerry's misrepresented ice cream as being "all natural," when the ice cream was in truth processed with synthetic ingredients. The Court held that there were questions of fact with respect to what was "all natural" for these purposes and, therefore, the claims would survive the motion to dismiss.

Another motion to dismiss was denied by the United States District Court for the Southern District of California in *In re Ferrero Litig.*, No. 11-CV-205 H(CAB), 2011 WL 5438979 (S.D. Cal. Aug. 29, 2011). There, a California mother alleged that Ferrero deceptively labeled and advertised Nutella as "healthy and beneficial to children when in fact it contains dangerous levels of fat and sugar." The Court found that these allegations were

sufficient to withstand a motion to dismiss. Interestingly, like in *Gerber*, plaintiff alleged that the product was designed to meet the nutritional needs of children.

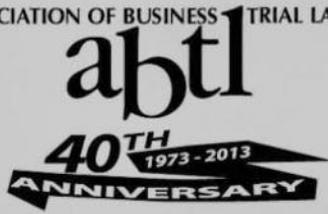
Other recent decisions are mixed. In *Jones v. ConAgra Foods, Inc.*, No. C12-01633 CRB, 2012 WL 6569393 (N.D. Cal. Dec. 17, 2012), plaintiffs alleged that ConAgra products such as PAM cooking spray, Hunt's canned tomato products, and Swiss Miss cocoa, misled consumers with labels claiming its products are 100% natural and contain antioxidants when they in fact contain synthetic chemicals, preservatives and artificial ingredients. The court held that, unlike with the Crunch Berry claims in *Sugawara*, it could not conclude as a matter of law that a reasonable consumer would not be deceived by the labels. However, the court granted the motion to dismiss plaintiffs' claims with leave to amend due to a lack of specificity about plaintiffs' actual purchases of ConAgra food products, requesting more information about when plaintiffs purchased the products, which products were purchased, and the offensive ingredients allegedly present in each product.

Together, the cases above set the table for the latest food fight: the battle between the corn industry and the sugar industry over the corn industry's allegedly false advertising with respect to high fructose corn syrup. In *Western Sugar Cooperative v. Archer-Daniels-Midland-Co.*, Case No. 11-cv-3473 CBM (MANx), 2012 WL 3101659 (C.D. Cal. July 31, 2012), a group of sugar growers and refiners claim that Archer-Daniels-Midland Co. and other corn refiners' advertising campaign marketing high-fructose corn syrup as "natural" and "nutritionally the same as table sugar" is deceptive and misleading to consumers. In July 2012, the Central District of California denied a motion to dismiss the claims against many of the defendants. This past fall, defendants filed counterclaims alleging that the Sugar Association had made false or misleading statements in asserting that processed sugar is healthier than high fructose corn syrup. While the claims in *Western Sugar* are under federal false advertising statutes rather than California law, the case has generated substantial media coverage and public attention towards false advertising claims in general, and it remains to be seen whether the court will be convinced that statements referring to high fructose corn syrup as "natural" are likely to deceive consumers.

The courts' steady diet of false advertising cases in the food industry seems unlikely to abate anytime soon. With continued media focus on health and diet, further challenges to food labeling and advertising appear inevitable; several new complaints and appeals are already pending. While California's consumer protection statutes are some of the broadest in the country, courts continue to dismiss cases on the pleadings when confronted with claims that, as the Eastern District of California put it in *Sugawara*, would require the Court to ignore "personal responsibility and common sense."

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