Filed 8/9/11 Gaston v. Schering-Plough Corp. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ROBERT GASTON, Plaintiff and Appellant, v. SCHERING-PLOUGH CORP. et al., Defendants and Respondents.	B214935 (Los Angeles County Super. Ct. No. JCCP 4352)

APPEAL from an order of the Superior Court of Los Angeles County. Carl J. West, Judge. Reversed.

Abraham, Fruchter, & Twersky, Mitchell M. Z. Twersky (pro hac vice) and Ximena R. Skovron (pro hac vice); Westrup Klick, R. Duane Westrup and Lawrence R. Cagney for Plaintiff and Appellant.

Jeffrey R. Bernstein for California Public Interest Research Group as Amicus Curiae on behalf of Plaintiff and Appellant.

Reed Smith, Michael K. Brown, Margaret M. Grignon, James C. Martin, David E. Stanley, Lisa M. Baird and David M. Gockner for Defendants and Respondents.

Plaintiff Robert Gaston appeals from the court order denying class certification in an action alleging violations of the unfair competition law (UCL) (Bus. & Prof. Code, §[1] 17200 et seq. & § 17500 et seq.[2]) and the Consumer Legal Remedies Act (CLRA) (Civ. Code, § 1770 et seq.) as well as fraud in connection with uniform representations made by defendants (Schering-Plough Corp., Schering-Plough Healthcare Products, and Schering-Plough Healthcare Products Sales Corp., collectively Schering) on the labeling of their Coppertone Sport SPF 30 Sunblock Lotion product (Product). Gaston contends the court erred in holding that common questions of fact and law did not predominate and that superiority was not present. We reverse.

FACTUAL AND PROCEDURAL SYNOPSIS

I. Procedural Background

A. The Complaint and Related Actions

Gaston filed this class action on February 10, 2004. On August 23, 2004, the court ordered the action coordinated with similar actions filed by Joseph Goldstein, Christopher Rovere, Glynis Lowd, Cristina Williams and Jessica Mulhearn (the Schering Actions). Similar actions filed against four other sunscreen manufacturers were deemed related in 2004 and 2005 (Related Actions, and together with the Schering Actions, the Sunscreen Cases).

In a letter submitted to the trial court on January 6, 2005, the Federal Trade Commission opined the Sunscreen Cases were not preempted by any of the statutes

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[1] Unless otherwise noted, all statutory references are to the Business and Professions Code.

[2] Although plaintiff alleged a cause of action under the false advertising law (FAL) (§ 17500 et seq.), he does not discuss that cause of action on appeal. Proposition 64 made identical changes to the requirements for standing and representative actions under the FAL. (*Harper v. 24 Hour Fitness, Inc.* (2008) 167 Cal.App.4th 966, 975.)

enforced by or regulations promulgated by the Food and Drug Administration (FDA). On February 22, 2005, the trial court ruled the Sunscreen Cases were not preempted by any statutes enforced by the FDA or by FDA regulations.

On April 7, 2006, plaintiffs filed a corrected amended master complaint (CAMC). Based on allegedly fraudulent and negligent misrepresentations in the labeling of the various sunscreen products, the CAMC alleged violations of the UCL, the CLRA, breach of implied and express warranties and fraudulent and negligent misrepresentation. The CAMC sought restitution and injunctive relief pursuant to the UCL and CLRA claims as well as damages pursuant to the CLRA and fraud claims.

In June 2006, the court rejected plaintiff's argument that restitution under the UCL would equal the purchase price of the sunscreen. Citing *Colgan v. Leatherman Tool Group, Inc*. (2006) 135 Cal.App.4th 663, the court ruled that plaintiffs would have to introduce evidence of "the dollar value of the consumer impact" of the challenged labeling terms. The court stated it has "serious reservations" about the ability of the individual plaintiffs to meet that burden.

On September 21, 2006, the Sunscreen Cases plaintiffs moved for a preliminary injunction against all defendants and submitted the declarations of two renowned research scientists regarding the dangers of UVA radiation.[3] The court denied the motion holding that the "blanket approach" of seeking to enjoin several sunscreen manufacturers from making certain labeling claims on numerous sunscreen products, all with different formulations, did not lend itself to granting of a preliminary injunction.

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[3] Gaston alleged that sunscreen products are used to protect human skin against the effects of exposure to the sun's harmful ultraviolet (UV) rays; UV rays are divided into UVA, UVB, and UVC rays. UVA rays, which are more constant year-round and penetrate deeper into the skin's layers, are harmful and have been shown to damage the DNA in skin cells, contribute to premature aging of the skin and cause the development of melanoma.

On March 6, 2007, the Schering defendants moved for summary judgment against all plaintiffs. On April 30, Goldstein moved for class certification limited to one product manufactured by the Schering defendants -- the same product at issue on appeal. On February 20, 2008, pursuant to Proposition 64, the court granted summary judgment in favor of defendants against Goldstein, Rovere, Lowd, Williams and Mulhearn on all their claims and against Gaston on his breach of warranty claims. The court found the record established Schering's labeling did not influence the Schering plaintiffs' decisions to purchase Coppertone sunscreen.

The court denied the summary judgment motion with respect to Gaston's UCL claims and his fraud and negligent misrepresentation claims. The court also denied defendants' motion for a no-merit determination pursuant to Civil Code section 1783 for Gaston's CLRA claim. The court held Gaston had raised a triable issue of material fact as to whether he had relied on defendants' alleged misrepresentations. At oral argument, the court stated Gaston's testimony demonstrated he had read the Product labeling and relied on defendants' misrepresentations in making his decision to purchase the Product.

B. The Class Certification Motion

Gaston filed his motion for class certification on May 30, 2008. Gaston submitted the evidence described below.

1. The Seggev Declaration

Gaston submitted the declaration of Eli Seggev with exhibits. Seggev holds a Ph.D in marketing and quantitative methods and has had a distinguished career in consumer research spanning over 30 years during which he conducted, designed, supervised and reported the results of hundreds of studies and trained researchers in small and large companies in a variety of industries. Seggev published a dozen scholarly articles in various peer-reviewed publications, many in the field of consumer research, held various academic appointments in graduate programs, and was awarded the

American Marketing Association Dissertation Award which is given annually for outstanding dissertations in marketing. Seggev's expert testimony had never been excluded by any court.

2. The Seggev Survery (Survey)

According to Gaston, the Survey was designed in accord with generally accepted scientific methodologies for survey research specifically outlined in the Federal Judicial Center's Reference Manual and Scientific Evidence, the prevailing authoritative text on the admission of scientific evidence in federal courts and widely cited in California courts.

Seggev designed the Survey as a double-blind study to determine consumer perceptions of the labeling claims at issue. A double-blind study is the most rigorous of survey methodologies because it does not reveal the purpose of the study to either interviewers or survey participants (called respondents), thus preserving the integrity of the results. The Survey was conducted using in-person interviews in various mall locations throughout California. In-person interviewing is a preferred methodology that is the most common method used by consumer research scientists in testing consumer perceptions regarding particular products because the alternate methods, such as conducting interviews at respondents' homes or at research facilities, are considered to be infeasible and cost prohibitive. Telephone interviews are also undesirable because they do not allow the respondents to handle the product that is the subject of the survey, and thus, limit the visual information available to the respondent which in turn can bias the results.

Here, in accord with generally accepted survey methodologies, Survey respondents were shown the Product and were permitted to handle it throughout the interview. The Survey followed other generally accepted consumer research methodologies in all respects. The results included:

> Over 90 percent of respondents believed the Product's claim of "sunblock" protection meant the Product provided protection from UVA rays and out of those respondents, nine out of ten believed the Product provided "blocking" protection for UVA rays.
>
> Over 87 percent of respondents believed the Product's claim of "waterproof" protection included protection against the sun's harmful UVA rays.
>
> Over 85 percent of the respondents believed the Product's claim of "ultra sweatproof" protection included protection against the sun's harmful UVA rays.
>
> More than four out of five respondents would choose a product that gave them UVA protection over one that did not and were willing to pay 15 percent more to obtain that benefit.
>
> Out of a list of eight factors, including protection from sunburn, the most important factor influencing respondents' purchase of the Product was protection from the sun's harmful rays.

Defendants did not submit any survey or other statistical evidence to refute plaintiff's Survey. Defendants submitted the declaration of Robert Reitter, who had previously performed work for defendants. Previously, Reitter's testimony on mall polling methodology had been excluded by a court which found Reitter's survey design and methodology were "inherently flawed" and did not meet the test for admissibility. (See *Citizens Financial Group, Inc. v. Citizens Nat'l. Bank of Evans City* (W.D. Pa 2003) U.S. Dist. LEXIS 25977, 15-16; *Citizens Fin. v. Citizens Nat. Bank of Evans City* (3d Cir. 2004) 383 F.3d 110, 118-121, 134.)

3. Gaston Declaration and Deposition

Gaston testified he purchased Coppertone products manufactured by Schering starting in the mid-1960's until the time he filed this action against Schering. Gaston stated it was his practice to read the labels before he purchased a product.

Gaston testified he was misled by the sun protection claims made on the label of the Product. Gaston also relied upon the "waterproof" and "sweatproof" claims on the Product label in making his purchasing decision.

Gaston stopped using Coppertone products in 2003, upon learning the products did not provide the sunblock, waterproof and sweatproof protection from the sun's UVA rays as claimed.

Gaston stated he was damaged in that he "did not receive the full extent of the protection I was led to believe the sunscreen products provided" and that he "suffered a loss of money" as a result.

4. FDA Regulation

The FDA has primary regulatory oversight over the labeling of sunscreen products. In an early ruling, the court found the FDA did not have any specific UVA labeling requirements, but the FDA required that labeling not be "false or misleading in any particular." The FDA had made certain findings of fact with respect to UVA labeling. In 1993, the FDA issued the Sunscreen Drug Products for Over-the-Counter Human Use; Tentative Final Monograph (TFM) (58 Fed. Reg 28194). In the TFM, the FDA recognized the importance of accurate UVA labeling on sunscreen products, stating "the agency believes that claims related to UVA protection are important information for consumers because UVA radiation has been shown to be harmful to the skin in that it contributes to both acute and chronic skin disease." (58 Fed. Reg. 28194, 28209.)

In 1999, the FDA issued the Sunscreen Drug Products for Over-the-Counter Human Use; Final Monograph (FM) (64 Fed. Reg. 27666). The TFM and FM made the following findings of fact with respect to UVA labeling claims:

1. "The agency has decided not to include the term 'sunblock' in the final monograph and now considers this term nonmonograph. The agency is concerned that the term 'sunblock' on the label of sunscreen drug products will be viewed as an absolute

term which may mislead or confuse consumers into thinking that the product blocks all light from the sun." (64 Fed. Reg. 27666, 27680.)

2. "The agency is concerned . . . that the term 'waterproof' . . . may be confusing or misleading to consumers because of the manner in which consumers may consider this term. The term 'waterproof' is defined as 'impenetrable to or unaffected by water.' . . . The agency believes that the term 'waterproof' could be interpreted by consumers to describe something that is completely resistant to water regardless of time of immersion, a meaning which is not consistent with the meaning of the term in the Panel's recommended monograph. Therefore, the agency is not proposing the labeling claim 'waterproof,' but is proposing instead the term 'very water resistant.'" (58 Fed. Reg. 28194, 28228; 64 Fed. Reg. 27666, 27675-27676.)

In the FM, the FDA encouraged sunscreen manufacturers to comply with the final rule "voluntarily as soon as possible." (64 Fed. Reg. 27666, 27667.) In 2001, the FDA issued a stay of its final rule "until further notice." (66 Fed. Regs. 67485 & 67486.) The stay "applies to all OTC sunscreen drug products that would be regulated under [21 CFR] part 352," i.e., sunscreen products claiming UVA protection. (66 Fed. Reg. 67485.) Thus, the TFM remains in effect with respect to UVA labeling requirements.[4]

5. Court Ruling

The court denied Gaston's motion based upon the predominance of individual questions of fact regarding reliance, causation, deception and injury. The court acknowledged its decision was the result of confusion about the impact of Proposition 64 on the elements of proof for UCL class actions claims. The court opined that it did not believe that the voters intended Proposition 64 to require absent class members to prove actual reliance and damages and that no class would ever be certified under such a rigorous standard. The court found the presumption of reliance set forth in *Vasquez v. Superior Court* (1971) 4 Cal.3d 800 did not apply to Gaston's CLRA and fraud claims.

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[4] Subsequent to the ruling in the case at bar, the FDA announced new requirements for sunscreens sold over-the-counter.

However, the court found Gaston satisfied the other criteria for class certification, i.e., numerosity, ascertainability, claims that were typical of the class and adequacy of representation.

DISCUSSION

I. Nature of the Action

Plaintiff sought certification of the following class:

> All persons and entities residing in the State of California who purchased Coppertone Sport SPF 30 Sunblock Lotion within the State of California, manufactured, sold, marketed, advertised and/or distributed by Schering-Plough HealthCare Products, Inc. between the period of February 10, 2001 and date of judgment (the 'class period').

According to plaintiff, the gravamen of his allegations is that defendants falsely labeled the Product by claiming it: (1) is a "UVA/UVB sunblock" when in fact the Product provides insignificant protection from the sun's harmful UVA rays; (2) provides "waterproof" protection against UVA /UVB rays, which has been defined by the FDA to mean "impenetrable to or unaffected by water" and "completely resistant to water regardless of time of immersion" when the Product is not impenetrable to, unaffected by, or resistant over time to water and provides insignificant UVA protection; and (3) provides "ultra sweatproof" protection against UVA/UVB rays, which implies the Product is impenetrable to or unaffected by sweat and completely resistant to sweat regardless of time of immersion or exposure, when the Product is not impenetrable to or unaffected by or resistant over time to sweat and provides insignificant UVA protection.

The front label of the Product contains the terms "ultra sweatproof," "waterproof" and "UVA/UVB sunblock."

The back label of the Product states:[5]

> Coppertone Sport SPF[] 30 Sunblock Lotion is equipment for your skin. It provides all day protection from the sun. This high performance, ultra-sweatproof sunblock bonds to your skin on contact. It won't run into your eyes and cause stinging. Its dry lotion formula doesn't leave a greasy residue which could adversely affect your grip. Plus, the hypoallergenic formula gives you waterproof protection from the sun's harmful UVA and UVB rays. PABA-free.
>
> DIRECTIONS: Apply liberally to all exposed areas prior to sun exposure and reapply after prolonged swimming, excessive perspiration, vigorous activity or toweling.
>
> WARNINGS: Avoid contact with eyes. If skin irritation or rash develops, discontinue use. For children under 6 months of age consult a doctor. Keep this and all drugs out of the reach of children. In case of accidental ingestion, seek professional assistance or contact a Poison Control Center immediately.

Plaintiff asserts his appeal challenges the court's findings that individual questions predominated concerning: (1) the elements of reliance, deception and causation on the UCL claim; (2) reliance and causation with respect to the CLRA and fraud claims; and (3) the finding superiority was not present because individual questions predominated with respect to reliance and causation. Plaintiff also contends the court erred in not applying the reasonable person standard to its determinations.

II. UCL

In order to obtain a class certification under the UCL, a plaintiff must establish the following questions are common to all class members: (1) whether a defendant's act or practice is unlawful, unfair or fraudulent, and (2) the amount of money a defendant may

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[5] Gaston's arguments for certification in the trial court were based on the face of the label.

have acquired by means of those acts that must be restored to the class. (See *Steroid Hormone Product Cases* (2010) 181 Cal.App.4th 145, 155.)

As noted by the trial court, to obtain certification under Code of Civil Procedure section 382, "a party must establish the existence of both an ascertainable class and a well-defined community of interest among class members." (*Linder v. Thrifty Oil Co*. (2000) 23 Cal.4th 429, 435.)

"[T]he UCL class action is a procedural device that enforces substantive law . . . . It does not change that substantive law." (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 313 (*Tobacco II*).) A court may certify a UCL claim as a class action when it meets the statutory requirements of Code of Civil Procedure section 382. (*Ibid*.) In *Tobacco II*, the court concluded that the effect of Proposition 64 was to prevent uninjured private persons from suing on behalf of others as they had been able to do prior to the passage of Proposition 64. (*Id*. at p. 314.)

Under the UCL, "'Class certification requires proof (1) of a sufficiently numerous, ascertainable class, (2) of a well-defined community of interest, and (3) that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods. In turn, the "community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class."'" (*Tobacco II*, *supra*, 46 Cal.4th 298, 313.) "The certification question is 'essentially a procedural one that does not ask whether an action is legally or factually meritorious.'" (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104.)

In the case at bar, the court found that the class was ascertainable. In terms of community of interest, the court found Gaston had claims typical of the class and could adequately represent the class, but individual inquiries predominated as to whether members relied on the label terms in purchasing the Product, if each member was in fact deceived by the terms, and what each member suffered as damages as a result of the

misrepresentations. The court also found the entitlement to restitution would require a highly individual assessment of causation given the UCL's standing requirement subsequent to Proposition 64. The court concluded it made its ruling "in view of recent authority. . . that imposes actual reliance and causation requirements on post Proposition 64 cases prosecuted under the [UCL]."

"Our task on appeal is not to determine whether the requested class is appropriate, but whether the trial court abused its discretion in granting or denying certification. Absent other error, this court will not disturb a ruling on class certification unless (1) the ruling is not supported by substantial evidence; (2) the trial court used improper criteria; or (3) the trial court made erroneous legal assumptions." (*Stern v. Superior Court* (2003) 105 Cal.App.4th 223, 232; see also *Linder v. Thrifty Oil Co*., *supra*, 23 Cal.4th at pp. 435-436 ["Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification. . . . Under this standard, an order based upon improper criteria or incorrect assumptions calls for reversal '"even though there may be substantial evidence to support the court's order."' Accordingly, we must examine the trial court's reasons for denying class certification. 'Any valid pertinent reason stated will be sufficient to uphold the order.'" (Citations omitted.)].)

Plaintiff posits the touchstone of the court's ruling was that the UCL, as amended by Proposition 64, requires a plaintiff to ultimately prove that all class members had relied upon, were deceived by and suffered damages as a result of the alleged misrepresentations and that consequently the court incorrectly determined individual questions of fact predominated. Plaintiff asserts that in light of the Supreme Court's holding in *Tobacco II* the court's ruling should be reversed as it was grounded on erroneous legal assumptions. We agree.

"[R]elief under the UCL is available without individualized proof of deception, reliance and injury" as requiring individualized proof would conflict with the broad relief afforded by section 17203, which provides that restitution is available "to restore to any

person in interest any money or property, real or personal, which may have been acquired by means of the unfair practice." (*Tobacco II*, *supra*, 46 Cal.4th at p. 320.) The court concluded that Proposition 64 did not impose "standing requirements on absent class members in a UCL class action where class requirements have otherwise been found to exist." (*Id*. at p. 324.) "[T]he plaintiff is not required to allege that those misrepresentations were the sole or even the decisive cause of the injury-producing conduct." (*Id*. at p. 328.) Prior to Proposition 64, individual proof was not required. (See *Blakemore v. Superior Court* (2005) 129 Cal.App.4th 36, 49 [A section 17200 violation "can be shown even without allegations of actual deception, reasonable reliance and damage."]; see also *Corbett v. Superior Court* (2002) 101 Cal.App.4th 649, 670 ["Consumers filing a UCL action do not have to prove that they actually have been deceived, but simply that they are likely to be deceived; the plaintiffs also do not need to prove that the defendant intended to injure anyone."].)

"The UCL outlaws as unfair competition 'any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.' (Bus. & Prof. Code, § 17200.) 'The scope of the UCL is quite broad. Because the statute is framed in the disjunctive, a business practice need only meet one of the three criteria to be considered unfair competition." (Citations omitted.) (*Morgan v. AT&T Wireless Services, Inc*. (2009) 177 Cal.App.4th 1235, 1253.)

"The 'unlawful' practices prohibited by section 17200 are any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made. It is not necessary that the predicate law provide for private civil enforcement. As our Supreme Court put it, section 17200 'borrows' violations of other laws and treats them as unlawful practices independently actionable under section 17200 et seq. 'Unfair' simply means any practice whose harm to the victim outweighs its benefits. 'Fraudulent,' as used in the statute, does not refer to the common law tort of fraud but only requires a showing members of the public '"are likely to be deceived."'" (Citations omitted.) (*Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 838-839.)

The court found the question of reliance was highly individual because the evidence (i.e. the depositions of the Schering plaintiffs) showed they had various reasons and motives for purchasing the Product. In addition, the court noted the Survey respondents interpreted the terms differently and attributed different meanings to those terms and Seggev acknowledged consumers had different motives for their purchasing choices. The court found that because reliance was an individual issue, causation also was an individual issue.

Plaintiff posits a common question exists as to whether the misrepresentations were likely to deceive the public, i.e., whether there was a fraudulent business practice. "A fraudulent business practice is one which is likely to deceive the public. It may be based on representations to the public which are untrue, and '"also those which may be accurate on some level, but will nonetheless tend to mislead or deceive. . . . A perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under"' the UCL. The determination as to whether a business practice is deceptive is based on the likely effect such practice would have on a reasonable consumer." (Citations omitted.) (*McKell v. Washington Mut., Inc*. (2006) 142 Cal.App.4th 1457, 1471.)

Plaintiff asserts that because he did not have to demonstrate that all Survey respondents relied or were deceived by defendants' representations or that the respondents uniformly interpreted the representations, the Survey data demonstrates defendants' representations tended to mislead the public, meaning it was a question common to all class members if the public was likely to be deceived. (See e.g., *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co*. (2004) 116 Cal.App.4th 1253, 1278-1279; *Pettit v. Retrieval Masters Creditors Bureau, Inc.* (7th Cir. 2000) 211 F.3d 1057, 1062.) In addition, the FDA had found the terms "sunblock" and "waterproof" tended to mislead the public. (64 Fed. Reg. 27666, 27680; 58 Fed. Reg. 28194, 28228.)

An unlawful business practice is "an act or practice, committed pursuant to business activity, that is at the same time forbidden by law." (Internal quotation marks &

italics omitted.) (*Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1360-1361.) Plaintiff contends there was a common question as to whether defendants' conduct was unlawful for two reasons: (1) the terms "sunblock" and "waterproof" violated 21 United States Code section 362(a), which states labels must not be "false or misleading in any particular"; and (2) defendants' conduct violates Civil Code section 1770, subdivision (a)(5), which prohibits the sale of goods to consumers by representing the goods have benefits or quantities they do not have. In an early ruling, the court determined the TFM was the applicable standard to apply and federal law did require that sunscreen labeling not be "false or misleading." Appellant alleged the Product does not provide the benefits of a sunblock that is waterproof and sweatproof as represented on the label, making the illegal nature of defendants' conduct a question common to all class members.

"[T]o state a claim under either the UCL or the false advertising law, based on false advertising or promotional practices, it is necessary only to show that members of the public are likely to be deceived. To achieve its goal of deterring unfair business practices in an expeditious manner, the Legislature limited the scope of the remedies available under the UCL. A UCL action is equitable in nature; damages cannot be recovered. . . . We have stated under the UCL, [p]revailing plaintiffs are generally limited to injunctive relief and restitution. [¶] The fraudulent business practice prong of the UCL has been understood to be distinct from common law fraud. A [common law] fraudulent deception must be actually false, known to be false by the perpetrator and reasonably relied upon by a victim who incurs damages. None of these elements are required to state a claim for injunctive relief under the UCL. This distinction reflects the UCL's focus on the defendant's conduct, rather than the plaintiff's damages, in service of the statute's larger purpose of protecting the general public against unscrupulous business practices." (Citations, fns. & internal quotation marks omitted.) (*Tobacco II*, *supra*, 46 Cal.4th at p. 312.)

The court found entitlement to restitution would require individual assessments as to causation given the UCL's standing requirements subsequent to the passage of

Proposition 64. Plaintiff asserts the questions of whether defendants may have acquired money from class members as a result of the alleged misrepresentations and whether injunctive relief may be awarded are common to all class members. The question of how much money was acquired is subject to common proof because under section 17203, that question turns on the amount of money received by defendants not on the perceptions of class members as to the efficacy of the Product. (*In re Steroid Hormone Product Cases, supra,* 181 Cal.App.4th at p. 155.) Plaintiff states he will establish the measure of restitution to which class members are entitled by use of Survey evidence and expert testimony. (See *In re Vioxx Cases* (2009) 180 Cal.App.4th 116, 131 ["The difference between what the plaintiff paid and the value of what the plaintiff received is a proper measure of restitution."]; *Colgan v. Leatherman Tool Group, Inc*., *supra,* 135 Cal.App.4th at p. 700 [measure of restitution may be established by expert testimony quantifying "either the dollar of the consumer impact or the advantage realized by [defendant]."].)[6] Injunctive relief is available when there is a threat the wrongful conduct will continue. (*Id*. at p. 701; § 17203.)

In *Vioxx*, the misrepresentations concerned the safety and efficacy of a particular pain reliever compared to a generic pain reliever. Accordingly, measuring restitution required indivdual proof as how safe and effective the drug was depended on each patient's treatment history, reason for taking the drug, medical condition and other factors unique to each individual. (*In re Vioxx Cases*, *supra*, 180 Cal.App.4th at pp. 135-136.) Plaintiff claims that unlike *Vioxx* the value of what he received does not depend on comparison with another product but the difference between the value of what was claimed by the Product and the value of what was actually provided by the Product.

Accordingly, plaintiff alleged common questions of law and fact under the UCL.

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6 The Survey revealed most respondents stated they were willing to pay 15.4 percent more for a product with UVA protection benefits than for one without such benefits.

III. CLRA and Fraud

A. The Claim

"A CLRA claim brought as a class action is governed exclusively by Civil Code section 1781, which sets out the four conditions that, if met, mandate certification of a class"; one of those conditions is that "[t]he questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members." (*In re Steroid Hormone Product Cases, supra*, 181 Cal.App.4th at p. 153.) "The trial court, however, has 'considerable latitude' under those four conditions in deciding whether a class action is proper," and appellate review is similar to that when a court denied certification of a class action pursuant to UCL. (*Ibid*.)

The court found individual questions of fact predominated concerning reliance, causation and damages with respect to plaintiff's CLRA and fraud claims. Defendants contends individual questions predominate on those issues because each sunscreen purchaser would have to be asked whether he or she read the label, and if he or she had done so, whether the label mattered. Then, for those for whom the labeling might have made a difference, further inquiries would be required on which terms did so and why.

Under the CLRA, a plaintiff is not required to show that substantial benefit will result to the litigants and the court or that each class member will come forward and prove his or her separate claim to a portion of the recovery. (*Corbett v. Superior Court, supra*, 101 Cal.App.4th at p. 670, fn. 9.) However, "[r]elief under the CLRA is specifically limited to those who suffer damage, making causation a necessary element of proof." (*Wilens v. TD Waterhouse Group, Inc*. (2003) 120 Cal.App.4th 746, 754; see also *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 [Damages are also an element of an action for fraud.])

Plaintiff claims defendants violated Civil Code section 1770, subdivision (a)(5), which provides it is an unlawful practice to represent that goods have characteristics which they do not have, because the labels stated the Product provided UVA protection when it did not. (See *Daugherty v. American Honda Motor Co., Inc*. (2006) 144 Cal.App.4th 824, 833-834.)

"The language of the CLRA allows recovery when a consumer 'suffers damage as a result of' the unlawful practice. This provision 'requires that plaintiffs in a CLRA action show not only that a defendant's conduct was deceptive but that the deception caused them harm.' Causation, on a class-wide basis, may be established by materiality. If the trial court finds that material misrepresentations have been made to the entire class, an inference of reliance arises as to the class. This is so because a representation is considered material if it induced the consumer to alter his position to his detriment. That the defendant can establish a lack of causation as to a handful of class members does not necessarily render the issue of causation an individual, rather than a common, one. '"[P]laintiffs [may] satisfy their burden of showing causation as to each by showing materiality as to all."' In contrast, however, if the issue of materiality or reliance is a matter that would vary from consumer to consumer, the issue is not subject to common proof, and the action is properly not certified as a class action." (Citations omitted.) (*In re Vioxx Class Cases*, *supra*, 180 Cal.App.4th at p. 129.)

B. Presumption of Reliance

The trial court found the presumption of reliance set forth in *Vasquez v. Superior Court*, *supra*, 4 Cal.3d 800 did not and could not apply to the alleged misrepresentations in this case. The court found the misrepresentations were uniform, but not material because (1) based on the testimony of the five named plaintiffs (in the Schering Actions), members of the class relied on the misrepresentations to varying degrees; (2) different segments of the Survey placed different premiums on the various misrepresentations on

the bottle; and (3) the Survey respondents interpreted the terms on the bottle differently and attributed different meanings to those terms.

In *Vasquez*, a CLRA action, the court held that "it is sufficient for our present purposes to hold that if the trial court finds material misrepresentations were made to the class members, at least an inference of reliance would arise as to the entire class." (*Vasquez v. Superior Court*, *supra*, 4 Cal.3d at p. 814.) The court then explained: "The requirement that reliance must be justified in order to support recovery may also be shown on a class basis. If the court finds that a reasonable man would have relied upon the alleged misrepresentations, an inference of justifiable reliance by each class member would arise. It should be noted in this connection that a misrepresentation may be the basis of fraud if it was a substantial factor in inducing the plaintiff to act and that it need not be the sole cause of damage. Plaintiffs suggest that individual proof of reliance may be dispensed with if, as they assert, fraud may be presumed from the alleged unconscionable price of the freezers [the product at issue]. We need not discuss the merit of this theory since we conclude that if the trial court finds that the alleged misrepresentations were material, it could find an inference or rebuttable presumption of reliance by each class member without his direct testimony." (*Id.* at p. 814, fn. 9.)

Plaintiff contends that under *Vasquez* common questions predominated as the label claims were material to a reasonable person as a matter of law and constituted a significant factor in consumers' purchases of the Product. Plaintiff posits the court should have considered whether a reasonable person would have attached importance to the label terms in deciding whether to purchase the Product. Plaintiff urges that the UVA representations were a substantial factor in consumers' purchases of the Product, even if to varying degrees and even if the labeling claims were interpreted somewhat differently by different class members. Plaintiff notes the majority of the Survey respondents consistently ranked UVA protection as the most important factor in their purchasing decision. Also, plaintiff cites the FDA determination that "claims related to UVA protection are important information for consumers because UVA radiation has been

shown to be harmful to the skin." (58 Fed. Reg. 28194, 28209.) Plaintiff also notes that three of five of the Schering plaintiffs stated they relied on the labeling claims at issue in their purchasing decisions.

The court found the Survey did not prove that common questions predominated. Plaintiff argues the Survey supports his position that the labeling claims were significant to a reasonable person because UVA protection benefits ranked the highest in importance to the Survey respondents as compared to other benefits such as scent or brand and because a majority of the participants said protection was the most important factor in their purchasing decision. The Survey results demonstrated that 77 percent of sunscreen users believed the term "sunblock" means protection from "most/all" of the sun's harmful rays; 90 percent of the users believed "sunblock" includes protection from UVA rays; one in five users believed that "waterproof" means the product will remain effective all day; 87 percent believed waterproof protection includes UVA protection; the term "ultra sweatproof" communicates to over half the users that those benefits extend longer than four hours, if not all day; more than four of five users would choose a product that provides UVA protection over one that does not. Plaintiff alleged the Product did not provide the UVA protection it claimed to provide.

In addition, the FDA determination (i.e., the TFM) that "claims related to UVA protection are important information for consumers because UVA radiation has been shown to be harmful to the skin" (58 Fed. Reg. 28194, 28209) supports a finding the misrepresentations were material and that finding should have been deferred to by the court. (See *RCJ Medical Services, Inc. v. Bonta* (2001) 91 Cal.App.4th 986, 1010.) Plaintiff further argues that even though other plaintiffs in the Schering Actions might have had different motivations as to why they purchased the product, those motivations are immaterial to the reasonable person standard to be applied in determining whether class members relied on the misrepresentations in making their purchases. (See *Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1292 ["'The fact a defendant may be able to defeat the showing of causation as to a few

individual class members does not transform the common question into a multitude of individual ones; plaintiffs satisfy their burden of showing causation as to each by showing materiality as to all.'"].)

Plaintiff was not required to prove every class member read the misrepresentation, but that the same uniform representation was made to every class member. (*Kaldenbach v. Mutual of Omaha Life Ins. Co*. (2009) 178 Cal.App.4th 830, 851; see also *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1095 ["[W]hen the same material misrepresentations have actually been communicated to each member of a class, an inference of reliance arises as to the entire class." (Italics deleted.)].)

The court cited (and defendants urge on appeal) the depositions of the five Schering plaintiffs demonstrate the labeling claims are not material because those plaintiffs did not read the label and considered other factors in their purchasing decisions. However, Dr. Seggev opined that the motivations of a few individuals are not a statistically reliable indicator of the motivations of the thousands of putative class members. (See *Vasquez v. Superior Court*, *supra*, 4 Cal.3d at p. 814 ["a misrepresentation may be the basis of fraud if it was a substantial factor in inducting the plaintiff to act and that it need not be the sole cause of damage"]; *Steroid Hormone Product Cases*, *supra*, 181 Cal.App.4th at p. 157 ["Materiality of the alleged misrepresentation generally is judged by a 'reasonable man' standard" and "such materiality is generally a question of fact."].)

The same labeling misrepresentations were made to all class members who purchased the Product, and the Survey indicates that the labels were a significant factor in their purchasing decisions. Thus, the labeling claims were material to a reasonable person, and the court should have applied the presumption of reliance as a matter of law.

C. Damages

Defendant contends proof of damages is an individual issue for the CLRA and fraud claims because the existence of, the cause of, and the extent of damages would have to be determined on an individual basis. Defendants suggest that the class members who did not read the labels or who obtained a benefit from and continued to use the Product are not entitled to damages. Each member need not prove he or she relied on the label as such reliance is presumed because the same misrepresentations were uniformly communicated. (*Vasquez v. Superior Court*, *supra*, 4 Cal.3d at p. 814, fn. 9.) In addition, even if some class members received some benefit from the Product, they are entitled to recover damages/restitution if they suffered "any damage." (Civ. Code, § 1780, subd. (a.).)

In *Wilens*, a case involving the insertion of a termination without notice provision in an internet broker agreement, the court noted that even though causation can sometimes be inferred by the materiality of the misrepresentation, "[T]hat differences in calculating damages are not a proper basis for the denial of class certification. But the individual issues here go beyond mere calculation; they involve each class member's entitlement to damages. Each class member would be required to litigate 'substantial and numerous factually unique questions to determine his or her individual right to recover,' thus making a class action inappropriate." (*Wilens v. TD Waterhouse Group, Inc*., *supra*, 120 Cal.App.4th at pp. 755-756; see also *Basurco v. 21st Century Ins. Co*. (2003) 108 Cal.App.4th 110, 118 ["'[A] class action cannot be maintained where each member's right to recover depends on facts particular to his case.'"].)

In the instant case, recovery does not depend on facts particular to the individual class members. As with his UCL claim, plaintiff asserts the issue of damages is common to all class members as the appropriate measure of damages is the difference between the actual value of what the defrauded person parted with and the actual value of what he

received. (Civ. Code, § 3343, subd. (a).) In other words, the amount restored will be a simple calculation based upon the difference of what was paid and what was obtained.

"'Causation as to each class member is commonly proved more likely than not by materiality. That showing will undoubtedly be conclusive as to most of the class. The fact a defendant may be able to defeat the showing of causation as to a few individual class members does not transform the common question into a multitude of individual ones; plaintiffs satisfy their burden of showing causation as to each by showing materiality as to all.'" (Citation omitted.) (*Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1292.)

"[A]lthough ultimately each class member will be required in some manner to establish his individual damages this circumstance does not preclude the maintenance of the suit as a class action." (*Vasquez v. Superior Court*, *supra*, 4 Cal.3d at p. 815.) In *Vioxx,* the court noted that although there was no classwide evidence of the price paid for the product at issue there, "the actual amounts paid could likely be resolved in a claims process." (*In re Vioxx Class Cases*, *supra*, 180 Cal.App.4th at p. 136, fn 23.) Plaintiff indicates expert testimony will aid in establishing the measure of damages and restitution. (See e.g., *Colgan v. Leatherman Tool Group, Inc.*, *supra*, 134 Cal.App.4th at pp. 674-677.) Hence, damages is also a common issue.

Accordingly, plaintiff alleged common questions of law and fact under the CLRA and fraud claims.

IV. Superiority

In deciding whether a class action would be superior to individual lawsuits, the court will usually consider four factors: (1) The interest of each member in controlling his or her own case personally; (2) The difficulties, if any, that are likely to be encountered in managing a class action; (3) The nature and extent of any litigation by individual class members already in progress involving the same controversy; and (4) The desirability of

consolidating all claims in a single action before a single court. (*Basurco v. 21st Century Ins. Co., supra,* 108 Cal.App.4th at p. 121.)

The trial court held that the individual class members would have little or no interest in controlling their own case personally given the size of the claims would be small and that there were no other cases pending in California involving the same claims. The court held that there would be serious manageability problems given the individualized issues of reliance and causation. However, as this court has determined those are common issues, the class action is superior as a matter of law.

Recently the United States Supreme Court handed down a significant class action decision in *Wal-Mart Stores, Inc. v. Dukes* (2011) 131 S.Ct. 2541. The lower courts had certified a class comprising about one and a half million current and former employees of Wal-Mart who claimed Wal-Mart had violated Title VII of the Civil Rights Act of 1964 because the discretion of local managers over pay and promotion was exercised disproportionately in favor of men, leading to an unlawful disparate impact on women. (*Id*. at p. 2544.) Addressing the question of commonality, the court noted the crux of a Title VII inquiry was "'the reason for a particular employment decision'" and concluded the class was improperly certified as there was no glue holding the alleged reasons for all the employment decisions together, meaning it would be impossible to say all the claims for relief would produce a common answer to the question of why the individual plaintiffs were disfavored. (*Id*. at p. 2545.) In that case, the plaintiffs had to show the company had a policy of discrimination. (*Id*. at p. 2553.) This case does not affect our analysis in the case at bar where uniform misrepresentations were made and injury depends on the reasonable person standard and not on the reasons for particular purchasing decisions.

DISPOSITION

We reverse the order denying class certification and remand with directions for the court to enter an order certifying the class. Plaintiff is awarded costs on appeal.

WOODS, Acting P. J.

We concur:

ZELON, J.

JACKSON, J.