

Committee on Children's Television, Inc. v. General Foods Corp.

35 Cal.3d 197

Supreme Court of California

December 22, 1983

Committee on Children's Television, Inc., et al., Plaintiffs and Appellants, v. General Foods Corporation et al., Defendants and Respondents. L.A. No. 31603. Named plaintiffs included five organizations (The Committee on Children's Television, Inc.; the California Society of Dentistry for Children; the American G.I. Forum of California; the Mexican-American Political Association; the League of United Latin American Citizens), as well as individual adults, and individual children. Sidney M. Wolinsky, Lois Salisbury and Robert L. Gnaizda for Plaintiffs and Appellants. Honora Kaplan, Norah M. Wylie and Gitlin, Emmer, Kaplan & Bohn as Amici Curiae on behalf of Plaintiffs and Appellants. Gibson, Dunn & Crutcher, John J. Hanson, J. Edd Stepp, Jr., Steven C. McCracken and Gail E. Lees for Defendants and Respondents. Opinion by Broussard, J., with Mosk, Richardson, Kaus, Reynoso and Grodin JJ., concurring. Separate concurring and dissenting opinion by Bird, C. J., not reproduced here.

BROUSSARD, J.

Plaintiffs appeal from a judgment of dismissal following a trial court order sustaining demurrers without leave to amend to their fourth amended complaint. The complaint essentially charges defendants – General Foods Corporation, Safeway Stores, and two advertising agencies – with fraudulent, misleading and deceptive advertising in the marketing of sugared breakfast cereals. The trial court found its allegations insufficient because they fail to state with specificity the advertisements containing the alleged misrepresentations. We review the allegations of the complaint and conclude that the trial court erred in sustaining demurrers without leave to amend to plaintiffs' causes of action charging fraud and violation of laws against unfair competition and deceptive advertising.~

Plaintiffs filed their original complaint on June 30, 1977, as a class action on behalf of "California residents who have been misled or deceived, or are threatened with the likelihood of being deceived or misled," by defendants in connection with the marketing of sugared cereals.^

The principal defendant is General Foods Corporation, the manufacturer of five "sugared cereals" – Alpha Bits, Honeycomb, Fruity Pebbles, Sugar Crisp, and Cocoa Pebbles – which contain from 38 to 50 percent sugar by weight. The other corporate defendants are two advertising agencies – Benton and Bowles, Inc., and Ogilvy & Mather International, Inc. – which handled advertising of these cereals, and Safeway Stores, which sold the products to plaintiffs. Finally, the complaint includes as defendants numerous officers and employees of the corporate defendants.~

Paragraph 34 alleges that defendants "engaged in a sophisticated advertising and marketing program which is designed to capitalize on the unique susceptibilities of children and preschoolers in order to induce them to consume products which, although promoted and labelled as 'cereals,' are in fact more accurately described as sugar products, or candies." The complaint thereafter refers to sugared cereals as "candy breakfasts."

Paragraph 35 lists some 19 representations allegedly made in television commercials aimed at children. Most of these representations are not explicit but, according to plaintiffs, implicit in the advertising. Paragraph 35 of the complaint reads as follows:

The advertising scheme routinely and repeatedly employs and utilizes, in commercials aimed at children, each of the following representations which are conveyed both visually and verbally: (a) Children and young children who regularly eat candy breakfasts are bigger, stronger, more energetic, happier, more invulnerable, and braver than they would have been if they did not eat candy breakfasts. (b) Eating candy breakfasts is a 'fun' thing for children to do, and is invariably equated with entertainment and adventure. (c) The sweet taste of a product ensures or correlates with nutritional merit. (d) Eating candy breakfasts will make children happy. (e) Bright colors in foods ensure or correlate with nutritional merit. (f) Candy breakfasts are grain products. (g) Candy breakfasts are more healthful and nutritious for a child than most other kinds and types of cereals. (h) Adding small amounts of vitamins and minerals to a product automatically makes it 'nutritious.' (i) Candy breakfasts inherently possess and/or impart to those ingesting them magical powers, such as the capacity to cause apes and fantastic creatures to appear or disappear. (j) Candy breakfasts contain adequate amounts of the essential elements of a growing child's diet, including protein. (k) The 'premiums' (small toys packaged in with the candy breakfast as an inducement to the child) are very valuable and are offered free as a prize in each box of candy breakfast. (l) Candy breakfasts are the most important part of a 'well-balanced breakfast' and are at least as nutritious as milk, toast and juice. (m) Candy breakfasts calm a child's fears and dispel a child's anxiety. ... (n) Candy breakfasts have visual characteristics which they do not in fact possess, such as vivid colors and the capacity to glitter or to enlarge from their actual size to a larger size. "In addition to the foregoing representations specified in Paragraph 35 (a) through (n), in each of the commercials for each of the products specified below the advertising scheme repeatedly, uniformly and consistently utilizes and relies upon the following representations with respect to particular products: (o) Cocoa Pebbles are good for a child to eat whenever he or she is hungry, and it is a sound nutritional practice to eat chocolatey tasting foods, such as Cocoa Pebbles, for breakfast. (p) Honeycomb (i) contains honey and (ii) consists of pieces which are each at least two (2) inches in diameter and (iii) will make a child big and strong. (q) Alpha-Bits (i) will enable a child to conquer his or her enemies, (ii) can be used by a child easily to spell words in his or her spoon, (iii) are an effective cure for the child's anxieties, and (iv) have magical powers and can impart magical powers to a child. ... (r) Fruity Pebbles (i) contain fruit and (ii) emit auras, rainbows or mesmerizing colors. (s) Super Sugar Crisp (i) should be eaten as a snack food without danger to dental health, (ii) should be eaten as a nutritious snack whenever a child is hungry, (iii) makes a child smart and (iv) is coated with golden sugar and such sugar is very valuable."

Plaintiffs allege that commercials containing these representations are broadcast daily. Although the commercials changed every 60 days, "they retain consistent themes and each convey ... the representations as set forth." Defendants, but not plaintiffs, know the exact times, dates, and places of broadcasts. Plaintiffs further allege that the same representations appear in other media, and on the cereal packages themselves. Paragraph 42 asserts that defendants concealed material facts:

In the advertising scheme planned and participated in by each and every Defendant, none of the following facts are ever disclosed: (a) The percentage of sugar and chemicals together in the products advertised ranges from 38% to 50% of the total weight of the product; (b) There is no honey in Honeycomb, no fruit in Fruity Pebbles, and the premiums packed into the boxes of Alpha Bits and Super Sugar Crisp cost no more than a few pennies at most; (c) Eating candy breakfasts may contribute to tooth decay in children and adults; (d) Eating candy breakfasts as a snack will cause tooth decay; (e) Children should brush their teeth soon after eating sugary foods; (f) For many children, excessive sugar consumption will have serious and detrimental health consequences, including obesity, heart disease, and other adverse health consequences; (g) For children with already existing health problems, especially diabetes, consuming candy breakfasts may have serious and detrimental health consequences; (h) There is a serious controversy over the adverse effects of sugar on the health of children; (i) Candy breakfasts are not the most important part of a balanced breakfast; (j) If eaten at all, candy breakfasts should not be consumed in large quantities and whenever a child is hungry; (k) Candy breakfasts cost more per serving than non-pre-sweetened breakfast cereals or hot cereals and more than other foods of better nutritional value than candy breakfasts; (l) A child's welfare is best served by accepting nutritional advice from his or her parents when such advice conflicts with advice given in television commercials; (m) The happy, adventure-filled fantasy portrayal of eating candy breakfasts is unrealistic and cannot be duplicated by any child.

Such concealment, plaintiffs allege, when joined with the affirmative misrepresentations listed in paragraph 35, render the advertisements misleading and deceptive.

The complaint asserts at length the special susceptibility of children to defendants' "advertising scheme," and explains how defendants take advantage of this vulnerability. It further asserts that, as defendants know, the desires and beliefs of children influence and often determine the decision of adults to buy certain breakfast foods.

The third through sixth causes of action set out various aspects of the tort of fraud. Each of these causes of action claims compensatory damages of \$10 million; those counts asserting intentional misrepresentation include a prayer for punitive damages. The prayer for relief is extensive, and includes some novel requests. In addition to seeking damages, restitution, and injunctive relief, plaintiffs seek warning labels in stores and on packages, creation of funds for research on the health effects of sugar consumption by young children, public interest representatives on defendants' boards of directors, and public access to defendants' research on the health effects of their products.⁶

Defendants demurred to the fourth amended complaint for failure to state a cause of action and for uncertainty. The trial court sustained the demurrers without leave to amend. The trial judge explained the basis for his ruling: "[I]n order to state a cause of action for fraud or for breach of warranty, there must be alleged with specificity the basis for the cause and that is, if there are advertisements which contain fraudulent

⁶ We discuss plaintiffs' right to seek damages, restitution, and injunctive relief in this opinion, but take no position on the suitability of the other remedies requested.

matters, those advertisements must be set out. [-] In paragraph 35, which is the heart of the allegations concerning the conveying of the representations, we have just a series of very general allegations to which there is no reference of an advertisement actually made. ... [-] Paragraph 38 which makes the allegations concerning media dissemination set out no television stations, no other media, except for the fact that these ads were run on television stations every day in Southern California for a four-year period. [-] This gives the defendant practically no kind of information concerning that which the defendant must answer, and it doesn't give the court a sufficient factual basis for its administration of the case."~

Plaintiffs base their third, fourth, fifth and sixth causes of action on the tort of fraud. Civil Code section 1710 defines that tort: "A deceit [fraud] ... is either: 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; 2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true; 3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact"~

"Fraud actions ... are subject to strict requirements of particularity in pleading. The idea seems to be that allegations of fraud involve a serious attack on character, and fairness to the defendant demands that he should receive the fullest possible details of the charge in order to prepare his defense. Accordingly the rule is everywhere followed that fraud must be specifically pleaded. The effect of this rule is twofold: (a) General pleading of the legal conclusion of 'fraud' is insufficient; the facts constituting the fraud must be alleged. (b) Every element of the cause of action for fraud must be alleged in the proper manner (i.e., factually and specifically), and the policy of liberal construction of the pleadings ... will not ordinarily be invoked to sustain a pleading defective in any material respect." (3 Witkin, Cal. Procedure (2d ed. 1971) Pleading, § 574¹⁷)

The specificity requirement serves two purposes. The first is notice to the defendant, to "furnish the defendant with certain definite charges which can be intelligently met."^ The pleading of fraud, however, is also the last remaining habitat of the common law notion that a complaint should be sufficiently specific that the court can weed out nonmeritorious actions on the basis of the pleadings. Thus the pleading should be sufficient "'to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud.'"^

We observe, however, certain exceptions which mitigate the rigor of the rule requiring specific pleading of fraud. Less specificity is required when "it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy,"^; "[e]ven under the strict rules of common law pleading, one of the canons was that less particularity is required when the facts lie more in the knowledge of the opposite party"^

¹⁷ Witkin adds, however, that: "In reading the cases one gains the impression that entirely too much emphasis has been laid upon the requirement of specific pleading. The characterization of some actions as 'disfavored' has little to recommend it ... and actions based on fraud are so numerous and commonplace that the implications of immoral conduct are seldom considered more serious than those involved in other intentional torts. Hence, while it seems sound to require specific pleading of the facts of fraud rather than general conclusions, the courts should not look askance at the complaint, and seek to absolve the defendant from liability on highly technical requirements of form in pleading. Pleading facts in ordinary and concise language is as permissible in fraud cases as in any others, and liberal construction of the pleading is as much a duty of the court in these as in other cases." (3 Witkin, op. cit. supra, Pleading, § 575, quoted in Lacy v. Laurentide Finance Corp. (1972) 28 Cal.App.3d 251, 258, fn. 2.)

Additionally, in a case such as the present one, considerations of practicality enter in. A complaint should be kept to reasonable length, and plaintiffs' fourth amended complaint, 64 pages long, strains at that limit.~ A complaint which set out each advertisement verbatim, and specified the time, place, and medium, might seem to represent perfect compliance with the specificity requirement, but as a practical matter, it would provide less effective notice and be less useful in framing the issues than would a shorter, more generalized version.

Defendants object to the allegations of misrepresentation on the ground that the complaint fails to state the time and place of each misrepresentation, to identify the speaker and listener, and to set out the representation verbatim or in close paraphrase. The place and time of the television advertisements, however, is fully known to defendant General Foods, but became available to plaintiffs only through discovery.^ That defendant equally knows the distribution of cereal box advertisements. A lengthy list of the dates and times of cereal ads on California television stations would add nothing of value to the complaint; the same is true for a list of California grocers marketing General Foods cereals. The language of the complaint – all ads for sugared cereals within a given four-year period – is sufficient to define the subject of the complaint and provide notice to defendants.

General Foods also knows the content of each questioned advertisement. Plaintiffs initially lacked such detailed knowledge, and although they have now obtained copies of the television storyboards through discovery, quotation or attachment of such copies to the complaint would consume thousands of pages. Attachment of the storyboards, moreover, would not redress defendants' grievance, which is, as we understand it, not that they lacked knowledge of the content of the commercials but that they do not understand what it is in the images and words that gives rise to the alleged misrepresentations.

For plaintiffs to provide an explanation for every advertisement would be obviously impractical. We believe, however, that the trial court could reasonably require plaintiffs to set out or attach a representative selection of advertisements, to state the misrepresentations made by those advertisements, and to indicate the language or images upon which any implied misrepresentations are based. This is a method of pleading which has been endorsed in other cases involving numerous misrepresentations.^ It represents a reasonable accommodation between defendants' right to a pleading sufficiently specific "that the court can ascertain for itself if the representations ... were in fact material, and of an actionable nature"^^, and the importance of avoiding pleading requirements so burdensome as to preclude relief in cases involving multiple misrepresentations.~

Defendants also object that the complaint does not indicate that any particular child relied upon or even saw any particular television advertisement. They point out that although the complaint does assert that each of the adult plaintiffs purchased General Foods' products at a Safeway Store, it does not state which advertisements they, or their children, saw and relied upon.

A specific statement of the advertisements seen and relied upon by the individual plaintiffs would serve to demonstrate both that they possess a valid cause of action in their individual capacity and that they are proper representatives for the class plaintiffs. The realistic setting of the case, however, may make such specific pleading impossible. A long-term advertising campaign may seek to persuade by cumulative impact, not by a particular representation on a particular date. Children in particular are

unlikely to recall the specific advertisements which led them to desire a product, but even adults buying a product in a store will not often remember the date and exact message of the advertisements which induced them to make that purchase. Plaintiffs should be able to base their cause of action upon an allegation that they acted in response to an advertising campaign even if they cannot recall the specific advertisements.~

Although the parties argue primarily the sufficiency and specificity of the pleadings, the underlying controversy is of much greater dimension. Defendants engaged in a nationwide, long-term advertising campaign designed to persuade children to influence their parents to buy sugared cereals. Adapted to its audience, the campaign sought to persuade less by direct representation than by imagery and example. While maintaining a constant theme, the particular advertisements changed frequently. Plaintiffs now contend that these advertisements were deceptive and misleading, and while we do not know the actual truth of those charges, we must assume them true for the purpose of this appeal. Yet, if we apply strict requirements of specificity in pleading as defendants argue, the result would be to eliminate the private lawsuit as a practical remedy to redress such past deception or prevent further deception. By directing their advertisements to children, and changing them frequently, defendants would have obtained practical immunity from statutory and common law remedies designed to protect consumers from misleading advertising.

It can be argued that administrative investigation and rule making would be a better method of regulating advertising of this scope and character. The California Legislature, however, has not established the necessary administrative structure. It has enacted consumer protection statutes and codified common law remedies which in principle apply to all deceptive advertising, regardless of complexity and scale, and, we believe, regardless of whether the advertisement seeks to influence the consumer directly or through his children. Established rules of pleading should not be applied so inflexibly that they bar use of such remedies.~

Plaintiffs should be permitted to amend their complaint on behalf of the parent and child plaintiffs under the causes of action for fraud.~

Legend: ~ *matter omitted* ^ *citations omitted*

Some omissions not notated. Italics and bold formatting generally eliminated without notation. Punctuation and capitalization changed in some places without notation. Some footnote material placed in body text without notation. Some paragraph breaks changed without notation.

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