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Failure to Disclose Claims Washed Away in Facial Scrub Case

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On December 17, 2018, Judge Andrew J. Guilford in the U.S. District Court for the Central District of California granted defendant Unilever's motion for summary judgment, dismissing all claims in a putative class action concerning St. Ives Apricot Scrub. *Browning v. Unilever United States, Inc.*, 2018 WL 6615064 (C.D. Cal. Dec. 17, 2018).

Plaintiffs alleged in their complaint that the walnut shell powder used as an exfoliant in St. Ives Apricot Scrub caused "micro-tears" in the skin and sped up the aging process, leading to wrinkles, inflammation, and loss of moisture. According to the complaint, while injury to the skin "may not be noticeable to the naked eye . . . it nonetheless leads to acne, infections and wrinkles." On this basis, Plaintiffs brought claims for unfair and deceptive acts and practices under both California and New York law, violation of California's Unfair Competition Law, false advertising under New York law, fraud, and breach of the implied warranty of merchantability

In granting defendant Unilever's motion for summary judgment, the court noted that Plaintiffs' claims were omission-based and, to be actionable, Unilever must have failed to disclose a fact that it was obligated to disclose. Plaintiffs argued that manufacturers of consumer products are required to disclose information related to the safety of their products, and the alleged negative side effects at issue made this product unsafe. However, in reviewing the declaration of Plaintiffs' expert dermatologist, the court noted that on its face Plaintiffs' expert merely said that he "wouldn't advise using the [s]crub," not that the product caused skin damage. In addition, the court criticized the expert's study investigating the effects of the scrub because this study included only fifteen participants and lasted only two weeks – hardly long enough to show long-term effects. The court also pointed out that Plaintiffs had not provided any causal link demonstrating that it was the scrub, and not a host of other potential lifestyle or environmental factors, that caused the alleged skin damage. The court therefore concluded that Plaintiffs failed to provide sufficient evidence to show that the product posed a safety hazard that Unilever was required to disclose.

Plaintiffs also argued that even absent a finding that the scrub was unsafe, Unilever still had a duty to disclose defects going to the "central function of the product." On this point, the court noted that even if the existence of an undisclosed defect that undermines the central function of a product were sufficient for a plaintiff to prevail on an omission-based claim—a question the court did not reach—Plaintiffs in this case made no showing that micro-tears in the skin resulting from product use would undermine this product's central function. In particular, the court noted that St. Ives Apricot Scrub "is an exfoliant and like all such products is necessarily abrasive." Thus, the court found that Unilever had no duty to disclose, and dismissed the omission-based claims.

The court also dismissed Plaintiffs' challenge to defendant's "Dermatologist Tested" claim on its product label. Plaintiffs did not allege that this claim was a misrepresentation in and of itself, but rather that the use of this phrase, while failing to disclose that the scrub was harmful to the skin, was misleading to consumers. But the court held that since it had already found that Unilever had no duty to disclose the skin damage Plaintiffs alleged was caused by the product, "this entire theory of liability falls flat."

On a separate note, we were pleased to learn recently that the ABA Journal has named our blog to its Web 100 for 2018. The Web 100 comprises 35 law blogs and 65 "web tools" of other types. Our blog was selected as one of the 35 top law blogs of 2018 by ABA Journal readers, staffers and an expert panel of lawyers. At the beginning of this new year, we want to thank our readers for following us, and encourage you to reach out to us with comments, questions and suggestions.

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