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NINTH CIRCUIT: NO STANDING TO BRING CALIFORNIA UNFAIR COMPETITION LAW CLAIMS BASED ON HYPOTHETICAL INJURIES

The close of the last decade may have brought with it the end of breach of warranty and unfair competition claims based on hypothetical, rather than actual, injuries, at least in the Ninth Circuit.

On December 30, 2009, the Ninth Circuit Court of Appeals affirmed the Northern District of California's dismissal of Joseph Birdsong's iPod "hearing loss" case against Apple, Inc. *Birdsong* v. *Apple, Inc.*, — F.3d —, No. 08-16641 (9th Cir. Dec. 30, 2009). Birdsong's allegations were typical of many recent "consumer protection" class actions: that a product is defective because it poses a hypothetical risk to users who may ignore warnings and common sense and use a product unsafely. Specifically, Birdsong and his co-plaintiff claimed that iPod users who raised the volume while wearing Apple's earbuds might eventually suffer hearing loss. Based on this scenario, the plaintiffs brought several breach of warranty claims and an unfair competition claim under California's Unfair Competition Law (UCL, Bus. & Prof. Code § 17200 *et seq.*).

The court found that the plaintiffs had not stated breach of warranty claims because, although an iPod—designed to be used with earphones as well as external speaker systems—is *capable* of playing loud music for long periods of time, that only means that users can choose to take risks with their hearing, not that the iPod was lacking in quality. Moreover, just because plaintiffs were able to imagine how to make the iPod safer—better earbuds, volume control software, warnings printed on the iPod itself, or a digital volume meter—does not mean the absence of those features actually hurt anyone.

Even more noteworthy is that the court found the plaintiffs had no standing to sue under California's UCL. Plaintiffs can gain standing under the UCL by showing both (1) injury in fact, and (2) lost money or property. The court found the plaintiffs had suffered neither.

The court held the plaintiffs had not alleged injury in fact because they merely alleged the potential risk of hearing loss to unidentified iPod users who might *choose* to raise the volume while listening for extended periods. The court held the allegation was not sufficiently concrete or particularized.

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The court also held the plaintiffs had not alleged a "loss of money or property" because any supposed "reduced value" of the iPod was based on a *hypothetical* risk of hearing loss to other consumers who might in fact use the iPod safely. Additionally, because plaintiffs did not allege that Apple made false or misleading representations about the product's safety that could be viewed as part of the "bargain" it struck with consumers, they could not allege they lost some sort of "safety" benefit as part of their bargain with Apple.

Given the California Supreme Court's recent permissive standing decision in the *In Re Tobacco II Cases*,[1] the Ninth Circuit's decision in *Birdsong* demonstrates that California UCL standing, though broad, is not unlimited. It is a welcome development for businesses defending similar purported "consumer protection" cases.

Arnold & Porter LLP is well-situated to assist clients in meeting their consumer protection litigation needs, with experienced counsel in Brussels, Denver, London, Los Angeles, New York, Northern Virginia, San Francisco, and Washington, DC. We hope that you have found this advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

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1 *See* Arnold & Porter Advisory, "California Supreme Court Issues Watershed Decision Relaxing Standing and Liability Requirements Under California's Unfair Competition Law," May 2009; *see also* "Reliance is Not Enough: California Consumers Must Lose Money or Property to Sue," March 2009, and "California's Supreme Court Rules That Consumers Must Have Suffered Actual Injury to Sue Under the State's Consumers Legal Remedies Act," Feb. 2009.