

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

Grove Fresh Distributors, Inc.	)	
	)	
Plaintiff,	)	
	)	
v.	)	NO. 89 C 1113
	)	
Everfresh, Inc. et al.,	)	HONORABLE JAMES B. ZAGEL
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Background

Plaintiff Grove Fresh Distributors, Inc. (Grove Fresh) moves for a finding that the statute of limitations defense had been waived by defendants, or, in the alternative, for a court order that the defendants amend their answer to include a statute of limitations defense and ask the court to rule on the validity of the defense. The defendants Everfresh Juice Co. and Hugo Powell (Everfresh) chose to respond by moving for an order limiting discovery to the appropriate statute of limitations. The Court will decide the statute of limitations question in response to both motions.

The complaint, alleging that the defendants made and sold adulterated orange juice which was labelled "100% pure" and that the plaintiff was harmed by the unfair competition, was filed on February 10, 1989. The complaint does not specify a time period for the alleged wrongful conduct. In various motions, discovery, and correspondence, Grove Fresh has made clear its intention of

going back as far as the late 1970s in discovery and possible damage claims. Plaintiff argues that the adulteration and resulting ~~unfair~~ competition constitutes a continuing wrong, which would allow it to look back to the beginning of the wrongful conduct for discovery and damage recovery purposes. Everfresh has a complicated history, allowing the defendants to suggest that their involvement only goes back to January of 1986. Therefore, they argue, the plaintiff's claim that a continuing wrong occurred cannot prevail. In addition, defendants argue that a three year statute of limitations is governing and that the scope of plaintiff's discovery and damages claims should be so restricted.

I.

First, the defendants have not waived a statute of limitations defense to pre-1986 discovery or damage claims. They realize that the statute of limitations is not a valid defense to this action and they did not raise it as such. Instead they argue that the statute of limitations restricts the scope of plaintiff's claims to 1986, based on a three year statute of limitations derived from the Illinois Consumer Fraud and Deceptive Business Practices Act. (Illinois Act) Ill. Rev. Stat. ch. 121 1/2, § 270a(e). When a federal cause of action has no specific applicable statute of limitations, the "settled practice" is to adopt the most appropriate state time limitation, unless this controverts federal law or policy. Wilson v. Garcia, 471 U.S. 261, 105 S. Ct. 1938, 1942 (1985). The three year

statute of limitations from the Illinois Act, which covers unfair competition, provides a better standard than the five year common law fraud statute of limitations suggestion made by plaintiff. The complaint now is based on unfair competition, the RICO claims having been previously dismissed. The question then becomes, does the defendants' alleged activity over the years constitute a continuing wrong akin to the copyright case Taylor v. Meirick, 712 F.2d 1112 (7th Cir. 1983)?

## II.

Plaintiff argues that the adulteration of orange juice and subsequent sale of adulterated juice which was labelled "pure" by the defendants (and possibly their predecessors) constitute a continuous course of conduct. Defendants claim that, since the corporate defendant changed hands in 1986, there can be no continuous course of conduct and that "there is no connection between that earlier period" and defendants' own actions. The fact is, if Boden Products, Inc. adulterated their orange juice with beet sugar before 1986 and Everfresh acquired Boden in 1986 and continued to adulterate the orange juice with beet sugar, that can certainly be construed as a continuing wrong, even though a new management had arrived. Nothing in Taylor precludes a possible continuous wrong accomplished by more than one person. In addition, Everfresh may face successor liability for wrongful acts perpetrated by Boden Products prior to 1986. E.E.O.C. v. Vucitech, 842 F.2d 936, 945 (7th Cir. 1988) (general principles

and purposes of successor liability); Continental Grain Co. v. Pullman Std., 690 F.Supp. 628, 631 (N.D. Ill. 1988) (general successor liability factors).

The Seventh Circuit has repeatedly held that a plaintiff may recover damages for the entire course of wrongful conduct, if plaintiff brings suit within the statutory period from the last wrongful act. Taylor v. Meirick, 712 F.2d 1112 (7th Cir. 1983). See also Malhotra v. Cotter & Company, 885 F.2d 1305, 1310 (7th Cir. 1989) ("If, having proved such a [continuing] violation, the plaintiff goes on to prove that it began earlier and that its earlier manifestation caused him additional injury, he can obtain a remedy for the increment as well as for the injury inflicted by the recent violation. This is nothing special to § 1981; it is a general principle of our law.) (emphasis added, citation omitted); Lancaster v. Norfolk and Western Railway Co., 773 F.2d 807, 822 (7th Cir. 1985) ("...[I]f the last act in a series of tortious acts that can fairly be described as a continuing violation of the plaintiff's rights is within the statutory period for suit, claims based on prior acts are not time-barred, the purpose being to avoid multiple suits.") (citation omitted). Taylor involved the continuing wrong of unauthorized copying and selling of copyrighted maps. The Seventh Circuit held that the plaintiff could recover for damages related to the entire wrongful course of conduct, despite the actual copying of the maps having been outside the scope of the three year statute of limitations.

The plaintiff in Taylor prevailed on two theories. First, fraudulent concealment, namely affixing the defendant's copyright over the plaintiff's, tolled the statute of limitations until the plaintiff discovered the violation. Second, the circuit court relied on the continuing wrong rule, "the general principle that the statute of limitations does not begin to run on a continuing wrong till the wrong is over and done with." Taylor, 712 F.2d at 1118. Judge Posner, writing for the panel, explained the theory as one which balances the interests of the plaintiff and the purposes of the statutes of limitations.

When the final act of an unlawful course of conduct occurs within the statutory period, [the dual] purposes [of reducing error due to distant claims and repose for people who then can proceed without fearing litigation] are adequately served, in balance with the plaintiff's interest in not having to bring successive suits, by requiring the plaintiff to sue within the statutory period but letting him reach back and get damages for the entire duration of the alleged violation. Some of the evidence, at least, will be fresh. And the defendant's uncertainty as to whether he will be sued at all will be confined to the statutory period. His uncertainty about the extent of his liability may be greater, but that is often true in litigation.

Id. at 1119.

If Grove Fresh can successfully support a claim for unfair competition because of "adulterated" orange juice labelled as "pure", then the plaintiff may be able to prove a continuing course of wrongful conduct from discovery materials. Despite the defendants' contention that the batches of orange juice were mixed, packaged, and sold individually, that does not destroy the

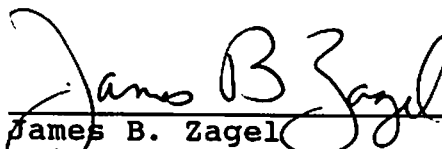
analogy to Taylor. Discovery may reveal a particular formula for juice and additives mixing used from 1983 to the present. Even if not, however, a continuous pattern of diluting "pure" juice with beet sugar or similar inexpensive additives and labelling and selling it as "100% pure" presents an analogous situation to Taylor. Grove Fresh will attempt to prove that the defendants have continuously sold "impure" orange juice as "pure", using the same techniques to effect and to disguise its wrongdoing over the years. Not every jar of juice has to be chemically identical for plaintiff to prevail on a continuing wrong theory. As long as the plaintiff can prove damages from the defendants' continuous course of wrongful conduct, including some wrongful conduct within the statutory period, the plaintiff can recover for the entire period.

### III.

Plaintiff's interrogatories served in December 1989 defined the relevant time period as January 1, 1983 to the present. Since that time at least, the defendants have known that they may have to provide documents as far back as 1983. In addition, this time period coincides with the president of Grove Fresh's recollection, according to his affidavit, of the approximate period of sales losses suffered by the plaintiff. Finally, defendants have raised the possible problem of plaintiff's lack of pre-1983 records, due to an intentional destruction of such documents. All things taken into consideration, permitting

discovery back to January 1983 strikes the best balance between the plaintiff's interest in being able to pursue damages for the entire period of alleged wrongdoing and the defendants' interest in a set, manageable time frame for which they are responsible. If it appears likely that the course of conduct began at a discernible earlier (or later) date, the Court may at that time amend the permissible reach of discovery.

Enter:

  
James B. Zagel  
United States District Judge

Date: DEC 13 1990