

# Daily Journal

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PERSPECTIVE

## FTC takes aim at apps for suspect claims

By Sheila A. Millar and Chris Van Gundy

**Y**ou want to track your blood pressure regularly but the trek to the local pharmacy to use a blood pressure cuff is inconvenient. So, when a smartphone app comes along that boasts its readings are as accurate as the traditional machine, requiring users to simply input gender, height, weight and birthdate to get instant BP readings, it seems like a life saver. Online reviews speak to its quality.

Aura's ads promised that its Instant Blood Pressure (IBP) app "could be used to replace around-the-arm cuffs and would be just as accurate as the traditional device." The problem is, according to the Federal Trade Commission (FTC), "studies demonstrate clinically and statistically significant deviations between the App's measurements and those from a traditional blood pressure cuff." And the glowing customer reviews? Aura's president and owner, Ryan Archdeacon, and co-founder and board chair Archie Giroux, allegedly wrote favorable reviews for the product without disclosing any conflict of interest.

And that made the FTC's blood boil. According to an FTC complaint, California-based Aura Labs Inc. sold the IBP app online for between \$3.99 and \$4.99. Between June 2014 and June 2015, Aura's sales of the IBP came to more than \$600,000 in "ill-gotten gains." Under the terms of the FTC's December 2016 settlement, Aura and its owner are prohibited from making any claims about the apps' health efficacy, and must divulge any material connections between Aura Labs and endorsers. The \$595,945 fine was suspended due to the company's inability to pay.

Or, you don't want to drink and drive and need a convenient way to tell you if you've over-imbibed. In a similar case, the FTC said an app that garnered fame on television's "Shark Tank" as an accurate way to assess blood alcohol content (BAC) didn't do the trick.

Breathometer Original attached to a smartphone through a jack. Consumers would then blow into a hole in the device. Five seconds later, the smartphone would display what the company represented in its advertising was the user's precise BAC. Not only that, the company said that the Breathometer Original would also "provide guidance on when you will be Back to Zero™ — or likely sober." Original was sold through a variety of major outlets online at a manufacturer's suggested retail price of \$49.99 beginning in mid-2013, with gross sales of \$3.1 million by March 2016.

Breeze, the Bluetooth-enabled version of Original,

sold for \$99.99, with gross sales from mid-2014 through March 2016 of approximately \$2 million. Breeze, like the Original app, claimed to be accurate but had serious additional defects. According to the FTC complaint, "In late 2014, Breathometer learned of accuracy problems with Breeze devices: They eventually degraded and suffered from downward "drift" in BAC calculations." And, while Breathometer became aware of the problem in 2015 and tried to correct the issue, it failed to notify consumers until 2016, and had no way to recalibrate the app once it had been installed on users' phones.

### Early evidence ... suggests app accuracy claims aren't always supported by the facts

Under the terms of the settlement with the FTC, Breathometer agreed to inform its customers of the defects and issue full refunds. CEO Charles Yim is prohibited from making any claims about Breathometer's accuracy unless they can be substantiated by tested and approved National Highway Transportation Safety Administration (NHTSA) specifications.

These types of cases, however, may also put businesses at risk for state law enforcement or class actions, including under the Unfair Competition Act (UCA) (Cal. Bus. & Prof. Code Sections 17200 and 17500) in litigation-friendly California. California's UCA is one of many state "little FTC acts" but is broader in scope in some important respects.

Notably, while the FTC Act does not create an independent private right of action, not only can local or state California law enforcement agencies sue under the UCA for violations, but any consumer who "lost money or property" can sue for "unfair, unlawful, or fraudulent" business practices. These definitions are very broad, and would easily encompass the claims at issue in these cases.

The "unlawful" prong of the UCA is also unique in another way: it permits California consumers or local or state law enforcement officers to sue for violations of other laws. For example, legal authority in California allows a consumer to allege that violations of the federal law are "predicate acts" for "unlawful" business practices under the UCA, even though a consumer cannot directly sue a company for violations of the FTC Act. The only limiting factors are that the consumer (1) must have lost money or property, and (2) can obtain only equitable relief (restitution of monies or property lost, declaratory and injunctive relief).

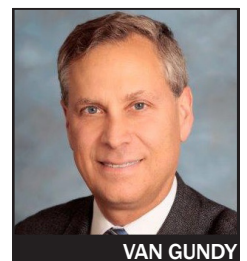
Local California district attorneys, or assistant attorneys general in the Consumer Fraud division, of course do not have to establish "lost money or property," and can seek civil penalties as well. California law enforcement officials actively pursue cases of perceived consumer fraud under the UCA. Given the relatively low barriers to standing and proof, the UCA for many years has provided government law enforcement agencies, private consumer attorneys and even business competitors with a powerful tool to address consumer fraud.

Smartphone apps that purport to provide reliable physical or health-related information are proliferating. But early evidence, such as a 2013 study published in the Journal of Medical Internet Research, suggests app accuracy claims aren't always supported by the facts. Such claims are ripe for challenge. Where the FTC has acted to obtain consumer restitution, as it did in the Breathometer case, or where a company has limited resources, as was the case with Aura, California law enforcement officials may elect not to expend resources to pursue further enforcement actions. Likewise, class action lawyers have little incentive to pursue claims in those circumstances. Nevertheless, with smartphone apps — and claims about what they offer — increasing, more enforcement actions and lawsuits are sure to follow. Moreover, depending on those claims, app makers may face concerns by another regulatory agency, the Food and Drug Administration. Advances in algorithms linked to sound clinical data truly hold the promise of innovative health care benefits to consumers. It's especially important to remember that any type of health-related claim must be backed up by competent and reliable scientific evidence, and that information suggesting that the apps are inaccurate or degrade need to be communicated to consumers. Companies that produce health-related apps need to take these obligations very much to heart. If they don't, they may just be in for some big legal headaches.

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