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UCL Class Certification After 'Tobacco II'

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Few consumer protection statutes nationwide are as expansive as California's Unfair Competition Law, a statute that protects consumers from "unlawful, unfair or fraudulent" business practices. On May 19, 2009, the California Supreme Court decided *In re Tobacco II*, 46 Cal.4th 298, which many practitioners believed would relax the requirements for certifying future UCL consumer class actions. We

Litigation

have reviewed recent lower court decisions to see how judges are interpreting *In re Tobacco II*. In brief, it appears that the decision has caused some courts to loosen requirements for certification of consumer claims, though a number of lower courts have construed the decision narrowly and appear to expect further clarification from the Supreme Court in the years ahead.

BACKGROUND ON UCL STANDING

Prior to 2004, the UCL had famously generous standing requirements, allowing suits to be brought not only by the attorney general but also by any person acting on behalf of "the general public." According to the Supreme Court, this standard led opportunistic plaintiffs' lawyers to file "shakedown suits" designed to extort money from small businesses for technical UCL violations.

In November 2004, California



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EASIER FOR PLAINTIFFS? Justice Carlos Moreno wrote for the majority in *In Re Tobacco II*, which has appeared to relax requirements for class certification in UCL cases.

voters passed Proposition 64 to protect small businesses. Prop 64 limits UCL class representatives to those who have "suffered injury in fact" and have "lost money or property as a result of such unfair competition." Cal. Bus. & Prof. Code §17204. In addition, Prop 64 explicitly mandates that class representatives comply with the general class action requirements found in the California Civil Code.

Before Prop 64 passed, the plaintiffs in *In re Tobacco II* filed suit alleging that the defendants (tobacco companies) had promoted tobacco

products by engaging in a "public disinformation strategy" to conceal smoking's health effects. The plaintiffs sought certification of a class action and included in their complaint a UCL fraudulent business practices claim.

The defendants opposed class certification, arguing that the plaintiffs should be required to offer individualized proof that each class member was exposed to a misrepresentation, that each was misled about smoking's health risks, and that the ads caused each member to purchase cigarettes. The Superior Court rejected the defendants' arguments and certified a class.

After voters passed Prop 64, however, the defendants filed a motion for decertification. This time, the court agreed. The court found

that the "simple language" of Prop 64 would require examination of whether each and every class member had been exposed to the defendants' statements, and whether each and every class member had purchased cigarettes "as a result of" this exposure. The Court of Appeal affirmed, and the Supreme Court granted review.

IN RE TOBACCO II DECISION

In *In re Tobacco II*, the Supreme Court addressed two issues: (1) whether all UCL class members must meet Prop 64's standing requirements; and (2) what a plaintiff must show in order to demonstrate that a loss occurred "as a result of" alleged unfair competition.

With respect to the first issue, the court found that only the class representative must demonstrate standing under the UCL. Justice Carlos Moreno, writing for the court, emphasized that Prop 64 did not alter the rules governing class certification, but instead targeted only the issue of the standing of the named plaintiff. The court concluded that focusing on class representative standing was not only consistent with the UCL's consumer-protection focus, but also with federal class action procedure.

With respect to how plaintiffs must go about proving causation in order to state a UCL claim, the court concluded that plaintiffs must show actual reliance. The need to prove actual reliance is ordinarily a bar to certification of claims in federal court under Federal Rule of Civil Procedure 23. In its explication of the definition of actual reliance, however, the California Supreme Court adopted a seemingly more expansive (and thus certification-friendly) formulation.

To show "actual reliance," the court stated that a "plaintiff must

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allege that the defendant's misrepresentations were an immediate cause of the injury-causing conduct." The court further explained: To be an immediate cause, plaintiffs need not allege that the misrepresentation was "the sole or even the decisive cause of the injury-producing conduct," only that the misrepresentation was "material" (i.e., "a reasonable man would attach importance to its existence" in making his choice). With respect to the particular facts at issue in *In re Tobacco II*, the court found that so long as the plaintiffs could allege exposure to long-term advertising campaigns, they would not be required to demonstrate that they "relied on particular advertisements."

Three justices concurred in the majority opinion's treatment of causation, but dissented from the holding with respect to standing. These justices explained that a class must be defined to include only individuals who have standing to sue — that is, every class member must be able to bring a suit on his or her own behalf.

UCL CLASS CERTIFICATION AFTER IN RE TOBACCO II

After *In re Tobacco II*, some courts appear more willing to certify classes asserting UCL claims. For example, in November 2009, the Orange County Superior Court certified a class of all California residents who purchased a particular contact lens solution. The complaint alleged that the defendants violated the UCL because their advertisements and packaging erroneously claimed the solution was a disinfectant, when in fact it could cause eye infections. The defendants argued, among other things, that many purchasers did not review or rely on the advertisements or packaging. Citing *In re Tobacco II*, the court rejected that argument, explaining that the plaintiffs are not required to prove actual reliance by all absent class members. Indeed, the court found that the plaintiffs need only show that members of the public were *likely* to be deceived, and deemed that standard met based on the defendants' use of standard product packaging and advertising.

In January, the First District Court of Appeal showed a similar willingness to certify UCL classes post-*In re Tobacco II* by reversing the trial court's decertification decision in *Weinstat v. Dentsply International, Inc.* Prior to the Supreme Court's decision in *In re Tobacco II*, the trial court granted the defendant's motion to decertify a class of dentists who alleged that the defendant's cleaning equipment contained misleading instructions. The trial court's decision to decertify the class primarily relied on the then-recent appellate decision, *Pfizer Inc. v. Superior Court*,

which held that Prop 64 required *all* UCL class members to suffer injury in fact and demonstrate causation. The First District reversed, finding it "abundantly clear" after *In re Tobacco II* that the trial court improperly required each class member to demonstrate standing. Interestingly, the appellate court did not analyze whether the class definition would satisfy class requirements, such as commonality and typicality, but instead simply remanded the case for the limited purpose of determining whether the named representatives could meet the UCL standing requirements.

However, some courts have distinguished and limited *In re Tobacco II*'s holdings, refusing to certify consumer class actions.

For instance, in *Kaldenbach v. Mutual of Omaha Life Insurance*, the plaintiff brought a class action on behalf of purchasers of the defendants' life insurance policies, alleging that defendants' sales agents gave misleading sales presentations about the policies. The trial court denied class certification, finding that a myriad of individual issues predominated. In September 2009, the Fourth District affirmed and emphasized that, unlike *In re Tobacco II*, defendants' conduct was not uniform across the class and thus, individual questions other than reliance predominated. Notably, the plaintiffs in *Kaldenbach* alleged that the defendants' conduct was uniform across the class, but the trial and appellate courts were persuaded by evidence offered by the defendants that class members likely were exposed to different promotional materials.

Also in September 2009, in *Cohen v. DIRECTV, Inc.*, the Second District affirmed the denial of class certification in a case in which the plaintiff alleged that DIRECTV violated UCL by misrepresenting the resolution of its high-definition offerings in its advertisements. The *Cohen* appellate court found that whether individual subscribers saw any relevant advertisements and why subscribers purchased a high-definition package were, in fact, critical questions that required proof on an individual basis. In making its decision, the appellate court appeared to rely on defendants' evidence, such as subscriber declarations showing they did *not* rely on the allegedly deceptive advertisements when purchasing HD.

About three months later, the Second Appellate District also affirmed a trial court's denial of class certification in *In re Vioxx Cases*. In *Vioxx*, plaintiffs brought a class action on behalf of Vioxx purchasers, alleging that Merck's advertising campaign failed to disclose Vioxx's adverse cardiovascular risks and misrepresented that the drug was safer than the generic version.

The trial court denied class certification, finding that multiple individual issues predominated. Citing Merck's expert's testimony that numerous individual factors influence each physician's prescription decision for each patient, the appellate court agreed. The appellate court also agreed with the trial court's findings that the plaintiffs' claims were not typical of the third-party payors included in the class and that class damages were not subject to common proof.

Furthermore, although the Supreme Court in *In re Tobacco II* adopted an expansive causation standard, some courts have concluded that it is not unlimited. For example, in *Princess Cruise Lines, Ltd. v. Superior Court*, the plaintiffs brought a purported UCL class action on behalf of cruise passengers who allegedly paid inflated prices for shore excursions booked through the cruise line. The trial court granted the defendant's motion for summary judgment with respect to the fraud-based UCL claim. The Second District affirmed. The court found that the class representatives could not satisfy the "actual reliance" required by *In re Tobacco II* because the evidence showed that neither cost nor the defendants' advertisements were a factor in their purchasing decisions.

CONCLUSION

The case law interpreting *In re Tobacco II* is still limited. Nonetheless, the above decisions show that courts have not read the decision as necessarily requiring certification of all consumer claims. These cases also highlight the importance of presenting evidence about product packaging and marketing at the trial court level, since such evidence often appears to feature prominently in class certification decisions.

We note that further clarity about the appropriate interpretation of the causation standard set forth in *In re Tobacco II* may come soon. In *McAdams Tim v. Monier, Inc.*, C051841 (Third District) and *Pfizer v. S.C. Galfano*, B188106 (Second District), appellate courts writing before the Supreme Court decided *In re Tobacco II* offered differing interpretations of the meaning of reliance under Prop 64. Both cases were recently sent back to the courts of appeal for further argument, in light of *In re Tobacco II*. Both cases are worth watching for consumer class action practitioners.

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