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False Advertising Class Action Update

CALIFORNIA SUPREME COURT HOLDS THAT ABSENT CLASS MEMBERS NEED NOT HAVE STANDING FOR A CLASS ACTION TO BE CERTIFIED ALLEGING A FALSE ADVERTISING CLAIM ON THEIR BEHALF

In a long-awaited decision, the California Supreme Court, on May 18, 2009, provided a victory to California plaintiffs' lawyers who bring false advertising class actions under California's Unfair Competition Law (Bus. & Prof. Code § 17200, *et seq*.) ("UCL"). *In re Tobacco II Cases*, 2009 Cal. LEXIS 4365 (Cal. May 18, 2009). The Court made two principal holdings. First, the Court held that Proposition 64's "standing requirements are applicable only to the class representatives, and not all absent class members." Second, the Court held that "a class representative proceeding on a claim of misrepresentation as the basis of his or her UCL action must demonstrate actual reliance on the allegedly deceptive or misleading statements, in accordance with well-settled principles regarding the element of reliance in ordinary fraud actions" – a standard that should not be difficult to meet, given that plaintiffs' counsel hand-pick the named plaintiffs. The Court's decision may make it easier for plaintiffs asserting UCL claims in California state court to obtain class certification, but may have less impact for such claims brought in, or removed to, federal court. Below we discuss the Court's decision and its potential repercussions for UCL class actions, as well as potential arguments to ameliorate the decision's impact.

The complaint alleged that numerous tobacco companies "violated the UCL by conducting a decades-long campaign of deceptive advertising and misleading statements about the addictive nature of nicotine and the relationship between tobacco use and disease." The complaint sought only economic losses resulting from the class members' purchase of cigarettes. The trial court certified a class defined as: "All people who at the time they were residents of California, smoked in California one or more cigarettes between June 10, 1993 to April 23, 2001, and who were exposed to Defendants' marketing and advertising activities in California." Thereafter, the people of California adopted Proposition 64 by referendum. Proposition 64 amended § 17204 of the UCL "by deleting the language that had formerly authorized suits by any person 'acting for the interests of itself, its members or the general public,' and by replacing it with the phrase, 'who has suffered injury in fact and has lost money or property as a result of such unfair competition.'" After Proposition 64 was enacted, defendants filed a motion to decertify the class, which the trial court granted. The Court of Appeal affirmed the decertification, holding that the new standing requirements of Proposition 64 applied to all members of the putative class and that, accordingly, individual issues of exposure to the allegedly deceptive statements and reliance upon them, predominated over common issues.

In a 4-3 decision, the Supreme Court reversed, with the deciding vote cast by an intermediate appellate court judge who was assigned to hear the case because of a recusal by one of the Supreme Court judges. The Court first held that the standing requirements of Proposition 64 applied only to the named plaintiff, reasoning that Proposition 64 was unambiguous and that "nothing in the text of Proposition 64, nor in the accompanying

ballot materials, makes any reference to altering class action procedures to impose upon all absent class members the standing requirement imposed upon the class representative." The Court further concluded that "requiring all unnamed members of a class action to individually establish standing would effectively eliminate the class action lawsuit as a vehicle for the vindication of such rights." The Court also noted that Proposition 64 did not amend the remedies provision of the UCL, which provides for, among other things, a monetary award that "restore[s] to any person in interest any money or property . . . which *may* have been acquired by means of" violation of the UCL. (Emphasis added).

In its second major holding, the Court held that Proposition 64's standing requirement – that the named plaintiff have "suffered injury in fact and has lost money or property *as a result of* [the defendant's] unfair competition" – meant that the named plaintiff "must demonstrate *actual reliance* on the allegedly deceptive or misleading statements." (Emphasis added). That is, the plaintiff must prove that the defendant's unfair competition was an "immediate cause" of its harm in that, in the absence of the defendant's conduct, the plaintiff "in all reasonable probability would not have engaged in the injury-producing conduct." However, the plaintiff need not demonstrate that its reliance on the truth of the defendant's misrepresentation was "the sole or even the predominant or decisive factor" in influencing it to purchase the product. Rather, it is sufficient that it show that the misrepresentation "played a substantial part, and so had been a substantial factor, in influencing [its purchasing] decision." In addition, "where, as here, a plaintiff alleges exposure to a long-term advertising campaign, the plaintiff is not required to plead with an unrealistic degree of specificity that the plaintiff relied on particular advertisements or statements."

The Court remanded for determination of whether the named plaintiffs can establish the standing requirements of Proposition 64. The Court did not address how, given that the class definition required that class members must have been "*exposed* to Defendants' marketing and advertising activities in California" (emphasis added), membership in the class could be determined without an individual inquiry.

The dissent rejected the majority's premise that a class can contain members who could not bring a UCL action individually: "Under well-established class action rules, the putative class the named plaintiffs seek to represent may include only persons who could themselves bring similar UCL claims in their own behalves. They could do so only if they themselves met Proposition 64's standing requirement. It follows inexorably that any UCL class certified in this action must be limited to those individuals who also actually relied on defendants' alleged deceptive advertising campaign when purchasing and smoking cigarettes, and thereby suffered loss." The dissent continued that, under the majority's reasoning, "an individual whose personal effort to bring a UCL action failed because he or she could not demonstrate any personal injury or loss caused by the unfair practice may simply join, as an uninjured class member, in an identical class action brought by another named plaintiff who does meet the minimal injury-in-fact and causation requirements. Again, this cannot be what the electorate intended to achieve by enacting Proposition 64."

The key question going forward is how broadly the Court's decision will be interpreted. On the one hand, the Court made clear that it was only addressing the new "standing" requirements imposed by Proposition 64. It also reaffirmed that "the UCL class action is a procedural device that enforces substantive law by aggregating many individual claims into a single claim . . . . It does not change that substantive law, however." In addition, although the Court stated that a plaintiff did not have "to demonstrate individualized reliance on specific misrepresentations to satisfy the reliance requirement," the Court did so in the context of a case where there was "exposure to a long-term advertising campaign" – a campaign that the Court described as "a decades-long campaign of deceptive advertising . . . denying and concealing that Defendants' tobacco products contain a highly addictive drug known as nicotine." On the other hand, the ruling could be read to mean that, because a member of a class does not have to meet the same standing requirements as the named plaintiff, a class member

could be awarded relief even if it never saw the claimed misrepresentation or suffered no injury proximately caused by the misrepresentation. If the ruling were given such a broad interpretation, it would be inconsistent with pre-Proposition 64 case law in which courts denied class certification on the ground, among others, that the issue of proximate causation could not be determined on a common basis. Such a broad ruling would also raise constitutional concerns. For example, to the extent the allegation in the case is that an advertisement was not explicitly false, but only false by implication, it would raise a serious question under the First Amendment to award money to a consumer who understood the advertisement correctly and was not misled, for in that instance the defendant would be compelled to pay restitution for making a truthful statement. In addition, a broad interpretation of the decision would deprive defendants of their due process right to contest each class member's claim and to demonstrate that the elements of the class member's cause of action have not been satisfied.

Only time will tell whether *Tobacco II* will have a broad impact – a case of bad facts making bad law – or, instead, be read as a limited standing decision. In this connection, it should be noted that, when the Massachusetts Supreme Judicial Court issued what appeared to be a broad interpretation of that state's unfair competition law in a false advertising case brought against a tobacco company, *Aspinall v. Philip Morris Cos., Inc.*, 813 N.E.2d 476 (Mass. 2004), courts in later cases gave the ruling a narrower interpretation where the defendant was not a tobacco company. In one of these cases, in which the Massachusetts Appeals Court reversed certification of a class, Kaye Scholer successfully represented the defendant. *See Kwaak v. Pfizer, Inc.*, 881 N.E.2d 812 (App. Ct. Mass. 2008).

In all events, the decision may have a limited impact because of the enactment of the Class Action Fairness Act. *See* 28 U.S.C. §§ 1332(d), 1453. Subject to some limitations, the Act generally provides for federal jurisdiction over any putative class action in which at least one of the defendants is from out-of-state and the aggregate amount in controversy is over $5 million. If a UCL case were brought in or removed to federal court, it is questionable whether a federal judge would hold that a class could be certified, or absent class members could recover relief, where each element of the claim could not be established on a common basis for each putative class member. *See, e.g., Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998) ("It is axiomatic that the procedural device of [a class action] cannot be allowed to expand the substance of the claims of class members."); 28 U.S.C. § 2072(b) (rules of procedure "shall not abridge, enlarge or modify any substantive right").

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