California Court of Appeal, Post-*Tobacco II*, Reaffirms Its Prior Ruling that a Class of All Purchasers of Listerine in California is Overbroad and that Class Certification Order Must be Vacated

On February 25, 2010, the California Court of Appeal issued its opinion reconsidering, in light of the California Supreme Court's decision in *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009), its prior ruling in *Pfizer v. Superior Court*, in which it had held that the trial court erred in certifying a class of all purchasers of Listerine for a six-month period. The Court of Appeal concluded that *Tobacco II* "does not require a different disposition" and, once again, held that the class of all purchasers of Listerine in California is overbroad, granted Pfizer's petition for a writ of mandate, and directed the trial court to vacate its class certification order and enter a new order denying plaintiff's class certification motion. *Pfizer v. Superior Ct.*, 2010 WL 660359, No. B188106, at *1 (Cal. Ct. App. Feb. 25, 2010).

At issue on appeal was an order of the trial court certifying a class of purchasers of Listerine mouthwash from June 2004 to January 7, 2005, during which time Pfizer ran print advertisements and television commercials claiming that Listerine is as effective as floss against plaque and gingivitis. The plaintiff, Steve Galfano, alleged that the Listerine advertisements falsely implied that Listerine could be used to replace the use of floss in reducing plaque and gingivitis, and asserted claims for false advertising and unlawful, unfair and fraudulent business practices under the Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200, 17500, and for breach of express warranty. The trial court, after severing the breach of warranty claim, held that the class was ascertainable and was so numerous as to render joinder impracticable, that there was a community of interest among the class members, and that Galfano's claims were typical of those of the class.

The California Court of Appeal reversed. The Court noted that Proposition 64, which amended the standing requirements of the UCL (Cal. Bus. & Prof. Code § 17204) to require that the plaintiff show that he or she "suffered injury in fact" and "lost money or property as a result of" the misleading statement, requires private representative actions to satisfy the procedural requirements applicable to class action lawsuits. It further held that in order to meet the community of interest requirement of the California class action rule, which requires, *inter alia*, that the class representative be typical of the class, the class members being represented by the named plaintiff likewise must have suffered injury in fact and lost money or property as a result of a UCL violation. In addition, the Court of Appeal concluded that, in light of Proposition 64, likelihood of harm to members of the public was no longer sufficient for standing to sue and that the plaintiff and absent class members must demonstrate that they actually relied on the false or misleading representation. It, thus, held that the trial court's ruling, because it included purchasers who were not exposed to the alleged false advertising, was overbroad, and granted Pfizer's petition.

The California Supreme Court granted review and ordered briefing deferred pending its decision in *Tobacco II*. In *Tobacco II*, the Court concluded that the Proposition 64 standing requirements are applicable only to class representatives, and not to absent class members. It further held that a class representative proceeding on an allegation of misrepresentation as the basis for his or her UCL action must demonstrate actual reliance on the allegedly false or deceptive statement, but need not plead or

prove reliance "with an unrealistic degree of specificity." *Tobacco II*, 46 Cal. 4th at 306. The Court thereafter transferred the *Pfizer* case back to the Court of Appeal with instructions to reconsider the matter in light of *Tobacco II*.

In its decision on remand, the Court of Appeal noted that the remedies available in a UCL action are limited to injunctive relief and restitution, that injunctive relief was not an issue given that the ad campaign in question ended years ago, and, quoting *Tobacco II*, that Proposition 64 did not enlarge "'the substantive rights [or] remedies of the class.'" (2010 WL 660359, at *5) The Court further recognized that the *Tobacco II* Court held that the language of the restitutionary provision of the UCL (Cal. Bus. & Prof. Code § 17203) — "'to restore to any person in interest any money or property, real or personal, which *may have been acquired*' by means of the unfair practice — is patently less stringent than the standing requirement for the class representative — 'a person who has suffered injury in fact and has lost money or property *as a result* of the unfair competition.'" (*Id*. at *6) (emphasis by the Court). The Court of Appeal further acknowledged that the Court in *Tobacco II* stated that this restitutionary language, construed in the light of the concern that wrongdoers not retain the benefit of their misconduct, has led courts repeatedly and consistently to hold that relief under the UCL is available without individualized proof of deception, reliance and injury. (*Id*.)

"Be that as it may," the Court of Appeal on remand ruled, "one who was not exposed to the alleged misrepresentations and therefore could not possibly have lost money or property as a result of the unfair competition is not entitled to restitution." (2010 WL 660359, at *6.) It reaffirmed its ruling that the class certified by the trial court is "grossly overbroad" because many class members, "if not most," clearly are not entitled to restitutionary disgorgement. (*Id*.) That is because, of 34 different Listerine bottles, 19 never included any label that made any statement comparing Listerine to floss; that even as to those flavors and sizes of Listerine bottles to which Pfizer did affix labels that are at issue, not every such bottle shipped between June 2004 and January 2005 bore such a label; and although Pfizer ran four different television commercials, the commercials did not run continuously, and there is no evidence that a majority of consumers saw the commercials. These facts, the Court of Appeal reasoned, stand in stark contrast to *Tobacco II*, where the tobacco industry allegedly violated the UCL by conducting a decades-long campaign of deceptive and misleading statements, and where it was reasonable to permit a class representative who actually relied on defendants' misleading ad campaign to represent other class members who may have lost money by means of the unfair practice. The Court concluded:

> In sum, the certified class, consisting of all purchasers of Listerine in California over a six-month period, is overbroad because it presumes there was a class-wide injury. However, large number of class members were *never exposed* to the "as effective as floss" labels or television commercials. As to such consumers, there is absolutely no likelihood that they were deceived by the alleged false or misleading advertising or promotional campaign. Such persons cannot meet the standard of section 17203 of having money restored to them because it "may have been acquired by means of" the unfair practice. In the language of section 17203, with respect to perhaps a majority of class members, there is no doubt Pfizer did not obtain any money by means of the alleged UCL violation. (*Id*. at *7.)

The Court of Appeal also held that plaintiff Galfano did not have standing to assert a UCL claim with respect to the television commercials or bottle labels that he did not see, and that he was an inadequate class representative. Galfano testified that he never saw any of the television commercials or other ads and that he bought Listerine due to the bottle's red label, which he recalled said "effective as floss," but did not recall what else the label said. Because the various labels and commercials contained different

language, with some expressly advising consumers to continue flossing, the Court held that Galfano's reaction to the Listerine red label was not probative of his, or the absent class members', reaction to different language contained in television commercials and other labels, and, thus, that he lacked standing to assert a UCL claim based on the television commercials or other labels. It further concluded that Galfano was an inadequate class representative on the ground that his limited experience with respect to the particular label he viewed is not representative of other consumers' experiences with respect to other aspects of Pfizer's "as effective as floss" campaign.

The decision is significant because it provides a road map for defeating class certification notwithstanding the holding in *Tobacco II* that only the named plaintiff must satisfy the standing requirements of Proposition 64. By highlighting that not all class members were exposed to the statements, that the challenged advertising statements at issue were not uniform, and the differing impacts those non-uniform statements could have on purchasers, it should be possible with effective advocacy to defeat class certification. Even post-*Tobacco II*, a class cannot be certified where many alleged class members did not even see or were not deceived by the alleged misrepresentation.

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